CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 49

GEORGE W. GRIFFITHS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. .....

GEORGE W. GRIFFITHS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Incomplete

TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

No. 6752

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GEORGE W. GRIFFITHS,
Respondent.

Counsel for Petitioner:
MR. JAMES W. MORRIS,

Counsel for Respondent:
MR. DELBERT A. CLITHERO,
MR. HERMAN A. FISCHER,
MR. CARLTON L. FISCHER,

Petition for Review of Decision of the United States Board of Tax Appeals.

TRANSCRIPT OF RECORD FILED SEP. 6, 1932.

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 6752

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GEORGE W. GRIFFITHS,
Respondent.

Counsel for Petitioner:
MR. JAMES W. MORRIS,

Counsel for Respondent:
MR. DELBERT A. CLITHERO,
MR. HERMAN A. FISCHER,
MR. CARLTON L. FISCHER,

Petition for Review of Decision of the United States Board of Tax Appeals.

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1 George W. Griffiths,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 82624.

Appearances:

For Petitioner: Herman A. Fischer, Esq.

For Respondent: C. H. Curl, Esq.

DOCKET ENTRIES.

1936

Jan. 6—Petition received and filed. Taxpayer notified. (Check returned for correction.)

Jan 11—Copy of petition served on General Counsel.

Jan. 11—Corrected check received—fee paid.

Mar. 2—Answer filed by General Counsel.

Mar. 6—Copy of answer served on taxpayer.

Mar. 13—Motion for circuit hearing in Chicago filed by General Counsel.

Mar. 16—Hearing set April 8, 1936 on motion.

Apr. 8—Hearing had before E. H. Van Fossan, Division 9, on motion of respondent to Circuit Calendar for Chicago—granted.

Apr. 8—Order that motion to place on Chicago Circuit Calendar be granted and proceeding placed on Circuit Calendar for hearing in Chicago, entered.

1937

Apr. 15—Hearing set week of June 14, 1937, Chicago, Ill.

May 8—Motion for leave to file reply filed by taxpayer—reply lodged.

May 17—Motion for leave to file reply granted.

May 18—Copy of motion and reply served on General Counsel.

June 24—Hearing had before J. E. Murdock on the merits. Called June 14, 1937. Stipulation as to the facts filed. Petitioner's brief due Aug. 15, 1937. Respondent's brief due Sept. 1, 1937. Taxpayer's reply due Sept. 15, 1937.

July 30—Transcript of hearing June 24, 1937 filed.

Aug. 13—Brief filed by taxpayer. 8/13/37 copy served on General Counsel.

Aug. 27—Brief filed by General Counsel.

Sept. 15—Reply brief filed by taxpayer. 9/15/37 copy served on General Counsel.

1938

Feb. 9—Findings of fact and opinion rendered—John E. Murdock, Division 3. Decision will be entered under Rule 50.

Mar. 2—Computation of deficiency filed by General Counsel.

Mar. 3—Hearing set March 23, 1938 on settlement.

Mar. 16—Consent to settlement filed by taxpayer.

Mar. 21—Decision entered—J. E. Murdock, Division 3.

June 15—Petition for review by U. S. Circuit Court of Appeals, Seventh Circuit, with assignments of error filed by General Counsel.

June 21—Proof of service filed by General Counsel (2—taxpayer and counsel).

Aug. 10—Agreed statement of evidence lodged.

Aug. 10—Praecipe of record filed by General Counsel with proof of service thereon.

Aug. 13—Agreed statement of evidence approved and ordered filed.

Aug. 13—Order enlarging time to 9/10/38 to transmit and deliver record entered.

Filed Jan. 6, 1936.

2 UNITED STATES BOARD OF TAX APPEALS.

George W. Griffiths, *Petitioner,*
vs.
Commissioner of Internal Revenue, *Respondent.*
} Docket No. 82624.

PETITION.

Filed January 6, 1936.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the respondent, the Commissioner of Internal Revenue, in his notice of deficiency dated November 1, 1935, and bearing symbols IT:E:Aj, HOB—10058; and as the basis of this petition alleges as follows:

1. Petitioner is an individual, having his principal office at 228 North LaSalle Street, Chicago, Illinois.

2. The notice of deficiency, a copy of which is hereto attached and marked Exhibit A, was mailed to the petitioner on November 1, 1935.

3. The taxes in controversy are individual income taxes

for the year 1933; and the notice states a deficiency of $61,219.97, tax and penalty, substantially all of which is in controversy.

4. Assignments of error:

In his determination of the amount of income tax as set forth in said notice of deficiency, the respondent has committed the following errors:

3 (a) The respondent has ignored a sale and assignment by the petitioner to G. W. G. Corporation of 5,000 shares of the capital stock of Oakridge Cemetery Corporation, which should have been regarded as an effective transaction.

(b) The respondent has erroneously treated a sale by G. W. G. Corporation of said 5,000 shares of the capital stock of Oakridge Cemetery Corporation as a personal transaction of petitioner's and not as a sale by said corporation.

(c) The respondent has treated certain transactions of G. W. G. Corporation as the petitioner's personal transactions, and based the finding of deficiency on the theory that the G. W. G. Corporation was, at most, the mere agent of the petitioner; but, at the same time, the Commissioner has inconsistently left in petitioner's gross income, as income received by him, the sum of $1243.13, paid to petitioner by said G. W. G. Corporation as interest on an indebtedness from said corporation to petitioner.

(d) The Commissioner has increased the amount of the deficiency as found by him by a fifty per cent penalty, stating that such increase is made under the provisions of Section 293-(b) of the Revenue Act of 1932. No facts exist which justify the imposition of any penalty under said section or under any other provision of the Revenue Act.

5. Statement of Facts.

On January 10, 1933, the petitioner was the owner of 5,000 shares of the capital stock of Oakridge Cemetery Corporation, and also had a claim for fraud which he asserted had been practiced upon him in the years 1925 and 1926 in inducing him to purchase this stock.

Under advice of counsel that it would be a proper transaction, petitioner, on January 10, 1933, assigned and transferred both this stock and this claim to G. W. G. Corporation, a corporation then organized by him, and which has ever since maintained its existence and transacted business. This transfer was made in consideration of

4 the covenant of said G. W. G. Corporation to pay to the petitioner the sum of $85,000.00 in installments over a term of years.

Following the consummation of the above mentioned transaction, G. W. G. Corporation effected a settlement of the above claim for damages, and in connection therewith sold this stock. In this settlement and sale, G. W. G. Corporation collected the amount of money which the deficiency letter proposes to treat as profits realized by the petitioner from the sale of the stock of Oakridge Cemetery Corporation.

Subsequently, and in the same year, 1933, the petitioner collected from G. W. G. Corporation $2,125.00 as an installment payment on principal, of which, in his income tax return, he treated $250.00 as a partial return of his investment, and treated the remaining $1,875.00 as profit. In the year 1933 the petitioner also collected from G. W. G. Corporation $1,243.13 as interest on the installment contract, and this interest was also returned by petitioner as profit. G. W. G. Corporation did not itself, in 1933, realize income by way of interest in that amount.

6. The petitioner, in his income tax return, fully disclosed the nature of this sale and the source and amount of the installment payment received thereon in the year 1933. The transaction was carried out and the return prepared under the advice of attorneys that it was a proper transaction and that a return made in the method used by petitioner correctly reflected the profit realized in 1933 from the transaction. Petitioner acted in the belief that this advice was well founded.

7. Prayer for Relief.

Wherefore, the petitioner prays that this Board will hear and determine this, his appeal, and prays that in so doing it will find the petitioner's return to have been properly made, the petitioner's profit realized in said year from the transaction in question to have been properly reflected in the return, and that the petitioner has done nothing to justify the imposition of any penalty upon him; and further prays that the deficiency may be re-ascertained on the basis of such findings.

Herman A. Fischer,
Counsel for Petitioner.

Herman A. Fischer,
Room 2500—1 N. LaSalle St.,
Chicago, Illinois.

State of Illinois }
County of Cook } ss.

George W. Griffiths, being first duly sworn on oath deposes and says that he is the above named petitioner and that he has read the foregoing petition and is familiar with the statements therein contained and that the same and all thereof is and are true as he verily believes.

Geo. W. Griffiths.

Subscribed and sworn to before me this 30th day of December, A. D. 1935.

Clarence H. Reeves,
Notary Public.

My commission expires April 18, 1938.

6 EXHIBIT A.

Nov-1 1935

IT:E:Aj
HOB-10058

Mr. George W. Griffiths,
228 North La Salle Street,
Chicago, Illinois.

Sir:

You are advised that the determination of your income tax liability for the year 1933, discloses a deficiency of $61,-219.97, tax and penalty, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932 as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates

thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
Guy T. Helvering,
Commissioner.
By (Signed) Chas. T. Russell,
Deputy Commissioner.

Enclosures:
Statement
Form 870
HOB:CMC

IT:E:Aj
HOB-10058-90D

In re: Mr. George W. Griffiths,
228 North La Salle Street,
Chicago, Illinois.

Year	Tax Liability	Tax Assessed	Deficiency	50% Penalty
1933	$42,053.04	$1,239.73	$40,813.31	$20,406.66
Total deficiency,			$61,219.97	

Consideration has been given to your protest dated April 23, 1935, addressed to the Revenue Agent in Charge, and to the contentions made at the conference held in the field on May 20, 1935, against adjustments proposed to your income tax return.

As the result, it is conceded that the item of $506.00 representing insurance premiums paid on a policy covering the life of a debtor, held as security for the debt is a proper deduction. With this exception the previous determination of liability has been sustained and the protest denied.

Net income less capital net gain reported,		$ 24,350.95
Add:		
1. Understatement of profit, sale of stock,	$73,558.92	
2. Alleged bad debts, disallowed,	16,725.32	
3. Reported loss, disallowed	500.00	
4. Legal expense eliminated,	2,000.00	92,784.24
Net income adjusted,		$117,135.19

Explanation of Adjustments.

1. Profit on the sale of 5,000 shares of Oakridge Cemetery Corporation stock computed as follows:

Amount received,		$100,000.00
Cost (acquired 1931 from John Griffiths Investment Trust),	$ 8,000.00	
Payment to E. H. Harrison,	14,566.08	
Markham and Allie, legal fee,	2,000.00	24,566.08
Profit,		$ 75,433.92
8 Amount brought forward,		$ 75,433.92
Reported,		1,875.00
Understatement of income,		$ 73,558.92

The alleged assignment of this stock to G. W. G. Corporation, (organized on the day of the sale, January 10, 1933) has been ignored, and the transaction treated as a sale by you, for your own account.

2. This adjustment is itemized as follows:

(a)	Carlton P. Perry,	$ 150.00
(b)	C. F. Van Sicklen,	3,000.00
(c)	Raymond Smith,	600.00
(d)	Prince and Whitely,	12,975.32
Total,		$16,725.32

(a) This appears to have been a four months' note dated November 25, 1914. Not deductible for the taxable year.

(b) One-year note dated August 1, 1921. Held not allowable during the taxable year.

(c) Note dated April 22, 1932, due December 15, 1932. Not shown to have become worthless during the taxable year.

(d) Seventy-five per cent of the debt of Prince and Whitely was claimed as a deduction in 1930, the balance $13,162.82 for the taxable year. Of the amount claimed $187.50 allowed and the balance $12,975.32 eliminated.

3. The available evidence indicates that the stock of Midas Oil Company became worthless in 1921.

4. Fee of Markheim and Allie allowed as shown in adjustment #1 above.

Computation of Tax.

Net income,		$117,135.19
Add: Capital net loss,		19,585.41
Income subject to surtax,		$136,720.60
9 Amount brought forward,		$136,720.60
Less: Dividends,	$76,628.92	
Exemption,	2,900.00	79,528.92
Subject to normal tax,		$ 57,191.68
Tax at 4% on $4,000.00		$ 160.00
Tax at 8% on $53,191.68		4,255.33
Surtax on $136,720.60		40,085.89
Total		$ 44,501.22
Less: 12½% capital net loss of $19,585.41		2,448.18
Net tax assessable		$ 42,053.04
Tax assessed		1,239.73
Deficiency		$ 40,813.31
50% penalty provided by Section 293 (b), Revenue Act of 1932		20,406.66
Total deficiency and penalty,		$ 61,219.97

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

HOB:CMC

Filed Mar. 2, 1936.

10 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—82624) * *

ANSWER.

Filed Mar. 2, 1936.

Now comes the Commissioner of Internal Revenue, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition filed herein, admits, denies and alleges as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4 (a) to (d), inclusive. Denies each and every allegation of error contained in the petition.

5. Admits that on January 10, 1933 the petitioner was

the owner of 5,000 shares of capital stock of the Oakridge Cemetery Corporation, and had a claim for fraud which he asserted had been practiced upon him in the years 1925 and 1926 in inducing him to purchase this stock; admits that the G. W. G. Corporation was organized by the petitioner; admits that in his income tax return the petitioner treated $1,875.00 as profit from an alleged sale of 5,000 shares of Oakridge Cemetery Corporation stock, but denies the remaining allegations contained in paragraph 5 of the petition.

11 6. Denies the allegations contained in paragraph 6 of the petition.

7. Denies that the petitioner is entitled to any of the relief for which he prays in paragraph 7 of the petition.

8. Denies, generally and specifically, each and every allegation contained in this petition not hereinbefore admitted, qualified or denied.

9. Respondent alleges that the petitioner filed a false and fraudulent income tax return for the year 1933, and that the deficiency for 1933 is due in part to fraud with intent to evade tax. The facts upon which respondent relies as a basis for the allegations of fraud are as follows:

(a) On or about February 17, 1934 the petitioner filed his Federal income tax return for 1933 in which he reported a net income on line 20 of $43,936.36, a capital loss on Exhibit L of $19,585.41, and a tax liability of $1,239.73.

(b) On line 11 of the income tax return which he filed for 1933, the petitioner reported $1,875.00 as the profit realized in 1933 on the disposition of 5,000 shares of the Oakridge Cemetery Corporation, whereas the petitioner well knew he had realized a taxable profit of not less than $75,433.92 on the transaction.

(c) In Exhibit F attached to his return the petitioner reported that the 5,000 shares in question had cost him

12 $8,000.00, that he had sold the shares on an installment basis for a gross price of $85,000.00, that legal fees paid in connection therewith amounted to $2,000.00, that the "Gross Unrealized Profit" from the transaction was $75,000.00, that the amount received in 1933 was $2,125.00, and that the taxable profit applicable to 1933 was $1,875.00. The petitioner's 1933 return contained no information with respect to the transaction other than in Exhibit F and on line 11.

(d) The petitioner first acquired the 5,000 shares in question in 1925 or 1926 upon the solicitation of one Robert D. Lay at a cost asserted by the petitioner to be $100,000.00. On or about October 30, 1931 petitioner sold the 5,000 shares

to the John Griffiths Investment Trust for $7,500.00 and on said transaction claimed and was allowed a loss deduction of $92,500.00 in his 1931 income tax return. On or about November 16, 1931 the petitioner reacquired the 5,000 shares from John Griffiths Investment Trust for $7,000.00 and on or about December 30, 1931 transferred the same shares back to John Griffiths Investment Trust for $7,000.00. Sometime later the petitioner received information that Robert D. Lay had been guilty of misrepresentation and fraud when Lay had induced him to acquire the stock, and acting on this information the petitioner demanded that Lay make restitution. After some controversy Lay acceded to the petitioner's demand, and paid the petitioner $100,000.00 by check No. 412, dated January 11, 1933 at Chicago, Illinois, and the petitioner returned the 5,000 shares to Lay. The petitioner had repurchased the 5,000 shares from the John Griffiths Investment Trust on January 10, 1933 for $8,000.00. The petitioner paid his informer $14,566.08 and paid $2,000.00 for legal fees in connection with the transaction. The petitioner realized a taxable profit of $75,433.92 on the resale of the 5,000 shares to Lay.

(e) In an effort to evade and defeat the payment of the full amount of Federal income tax due on the transaction for the year 1933 the petitioner caused the G. W. G. Corporation to be organized under the laws of Delaware on January 10, 1933, and on the same day went through the motions of entering into an agreement with the newly organized corporation, by the terms of which alleged agreement he pretended to sell the 5,000 shares to the corporation for an alleged consideration of $85,000.00, which amount, under the alleged agreement, was to be paid to the petitioner in installments running over a period of approximately thirty-nine years. The outstanding stock of the G. W. G. Corporation was wholly owned by the petitioner. The G. W. G. Corporation was not licensed to do business in the State of Illinois until February 11, 1933.

Wherefore, it is prayed that the appeal be denied and that the tax and penalty asserted in the notice of deficiency be in all respects approved.

(Signed) Herman Oliphant,
Herman Oliphant,
General Counsel for the Department of the Treasury.

Of Counsel:
C. H. Curl,
C. P. Reilly,
Special Attorneys, Bureau of Internal Revenue.

15 UNITED STATES BOARD OF TAX APPEALS. Filed May 17, 1938.

(Caption—82624)

REPLY.

Lodged May 8/37.

Filed May 17/38.

And now comes the petitioner, by Herman A. Fischer, his attorney, and for reply to paragraph 9 of the answer of the respondent herein, says:

1. This petitioner denies that he filed a false or fraudulent income tax return for the year 1933, and denies that the alleged deficiency for 1933 was properly increased by a penalty under Section 293-b of the Revenue Act of 1932 on the ground of fraud.

2. With respect to the facts which in the several clauses of said paragraph 9 of his said answer the respondent states that he relies upon as a basis for his allegations of fraud, this petitioner says:

(a) This petitioner admits the allegations of Clause (a) of said paragraph 9.

(b) This petitioner admits that on line 11 of his income tax return for the year 1933 he reported $1875.00 as the profit realized by him in 1933 on the disposition of 5000 shares of Oakridge Cemetery Corporation; but he denies that he realized a taxable profit thereon of
16 $75,433.92, or of any sum in excess of that reported by him, and denies that at the time he made his said return he knew that he had realized any other or different profit than that so reported by him.

(c) This petitioner admits the allegation in Clause (c) of said paragraph 9 contained.

(d) This petitioner admits the allegations contained in Clause (d) of said answer with respect to his initial acquisition of the shares in question, his sale thereof on which he had been allowed a loss deduction, certain subsequent intermediate transactions therein (which intermediate transactions are immaterial on the issues of this case), his subsequent information that one Lay had been guilty of misrepresentation and fraud, and the demand of restitution.

This petitioner denies that said Lay paid this petitioner $100,000 by check referred to in said clause; but states that, while a check for the amount referred to in

said clause was delivered by said Lay to petitioner, the petitioner received the same pursuant to an arrangement which petitioner had then recently made with G. W. G. Corporation. This petitioner therefore states that, as between himself and said G. W. G. Corporation he received said check for $100,000 solely as its agent. He admits that he had repurchased the 5000 shares from John Griffiths Investment Trust for $8000, but denies that he so repurchased it on January 10, 1933; and states that almost immediately upon the repurchase thereof he had entered into an agreement for its sale and had actually sold the same to G. W. G. Corporation, a Delaware
17 corporation, for the sum of $85,000, which sum was to be paid on an installment basis, and states that he correctly reflected his said resale in his said income tax return.

(e) This petitioner denies that he caused G. W. G. Corporation to be organized under the laws of the State of Delaware in an effort to evade and defeat the payment of the full amount of Federal income tax for the year 1933 due on the transaction referred to in said petition, and states that said G. W. G. Corporation was organized prior to any transaction on which Federal income tax was due or would become due. This petitioner admits that on the date said G. W. G. Corporation was organized he entered into an agreement with it by the terms of which agreement he sold to it the 5000 shares of said Oakridge Cemetery Association, together with such rights as he might then have against said Robert G. Lay to require said Lay to purchase said stock. He states that under said agreement of sale the consideration of $85,000 was to be paid to petitioner in installments running over a period of approximately thirty-nine (39) years. The petitioner states that the said G. W. G. Corporation was formed in good faith and with the intention that it should permanently transact business and that at the time it was formed here had been no transaction consummated to which any liability for Federal Income Tax could attach; and he denies that the said agreement is properly termed an alleged agreement, and denies that the action taken by him is properly termed "going through the motions of entering into an agreement." This defendant admits
18 that the outstanding stock of said G. W. G. Corporation was wholly owned by him; and (if it be material) he admits that said corporation was not licensed under the laws of the State of Illinois to do business in said State until February 11, 1933.

Wherefore this petitioner prays that the Board will find for this defendant upon all issues raised in the respondent's answer upon which the burden of proof is placed upon the respondent by statute.

Herman A. Fischer,
Attorney for Petitioner.

39 IN THE UNITED STATES CIRCUIT COURT OF APPEALS. Filed Aug. 13, 1938.

(Caption—BTA-82624)

STATEMENT OF EVIDENCE.

Lodged Aug. 10, 1938.

Filed Aug. 13/38.

The following is a statement of the evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable J. E. Murdock, Member of the United States Board of Tax Appeals on June 24, 1937, at Chicago, Illinois. Herman A. Fischer, Esq., appeared for the petitioner and C. H. Curl, Esq., Special Attorney, in the office of the Chief Counsel for the Bureau of Internal Revenue appeared for the Commissioner. The following facts were stipulated:

1. During the year 1926, the taxpayer purchased from or through Robert D. Lay 5,000 shares of the capital stock of Oakridge Cemetery Corporation at a cost of $100,000.00.

2. On October 30, 1931, the taxpayer sold certificate No. 861 for 5,000 shares of the capital stock of Oakridge Cemetery Corporation to John Griffiths Investment Trust for a consideration of $7,500.00. This stock was the same stock that he purchased in 1926 of or through Robert D. Lay for $100,000.00.

3. On November 16, 1931, the taxpayer reacquired the foregoing stock from the John Griffiths Investment Trust for a consideration of $7,000.00 and sold same back to said trust at the same price on December 30, 1931.

4. The taxpayer reported the sales of the said 5,000 shares of stock to the Trust, on his 1931 Federal income tax return, and claimed a loss of $92,500.00, which was allowed and the case closed by an agreement under
40 section 606 of the Revenue Act of 1928.

5. On January 10, 1933, the taxpayer gave his personal check No. 2520 to the John Griffiths Investment Trust for the sum of $8,000.00 and the certificate for 5,000

shares of the capital stock of the Oakridge Cemetery Corporation endorsed in blank was delivered to the taxpayer.

The evidence introduced at the hearing is as follows:

Attorney for the petitioner, Mr. Fischer, placed in evidence as petitioner's Exhibit 1 petitioner's income tax return for the year 1933; as petitioner's Exhibit 2, the minute book of the G. W. G. Corporation; for which there were substituted by agreement as petitioner's Exhibit 2-a, certified copy of the minutes of the meeting of the Board of Directors of the G. W. G. Corporation of January 10, 1933; as petitioner's Exhibit 2-b, certified copy of the minutes of the meeting of the Board of Directors of the G. W. G. Corporation of January 11, 1933; as petitioner's Exhibit 2-c, certified copy of the minutes of the meeting of the Board of Directors of the G. W. G. Corporation of January 18, 1933; and as petitioner's Exhibit 3, release to Robert Lay, dated January 11, 1933.

Thereupon the petitioner herein, George W. Griffiths, took the stand as a witness in his own behalf.

Testimony of MR. GRIFFITHS:

"I own all of the stock of G. W. G. Corporation and have owned it since its formation. I had had in mind the forming of such a corporation over a period of some time; having had considerable to do with the John Griffiths Investment Trust, I was a little familiar with such corporations and at the time this matter came up, this settlement with Lay, I discussed it with Mr. Markheim.

"The settlement with Lay grew out of the purchase of stock of the Cemetery Association. I paid a total sum of $100,000 for stock of the Oakridge Cemetery Company about 1927. I was induced to purchase this stock by Mr. Lay. A controversy arose with Mr. Lay in December, 1932, or early part of January, 1933. An individual came to me and informed me that Mr. Lay had misrepresented the facts at the time he advised or induced me to purchase this stock. I consulted Mr. Harry Markheim, an attorney, who was practicing law in Chicago.

41

"The formation of such a corporation as G. W. G. Corporation came up at the time Mr. Markheim was representing me in connection with my claim of liability to me of Mr. Lay. Mr. Markheim told me that it would delay the payment of taxes; that he had handled a similar matter practically the same as mine, and that the matter he

had handled had gone through the Internal Revenue Department and there had been no question raised about it. The matter he referred to had been handled some two or three years previously. He told me that it was perfectly legal, and that it was all right, and on his advise I formed this corporation. Mr. Markheim took charge of forming the corporation and prepared the agreements and resolutions.

"I told him that The John Griffiths Investment Trust owned that stock; that I had sold it to the Investment Trust in, I believe, 1931. He told me that in order to clean it up I should buy the stock back from the Investment Trust because of my right of action against Lay, and I believe Lay's attorney wanted it that way because the Investment Trust only had the stock and I had the right of action. Following this conference with Mr. Markheim I purchased stock from the Investment Trust. I paid approximately $8,000.00 for it. This was on January 10, 1933. At the suggestion of Mr. Markheim, Mr. Arthur Wells and my daughter were made directors of the corporation, although I have a faint recollection that prior thereto there were other directors temporarily. The minutes of the meeting of January 10th show that the directors present were Messrs. Albie, Mallen, and Wallbaum.

"Mr. Albie was the partner of Mr. Markheim and the others, I think one of them is an attorney in the office and the other an employee.

"At the meeting of January 10, 1933, there was an
42 agreement made between the G. W. G. Corporation signed by Mr. Albie as president and myself. Soon thereafter the controversy with Mr. Lay was settled. The controversy with Mr. Lay was settled about the 11th or 12th of January. In that settlement two checks were paid by Mr. Lay, one for $100,000.00 and one for $80,000.00. The $100,000.00 check was deposited to the account of the G. W. G. Corporation in the National Builders' Bank on January 12, 1933. On G. W. G. Corporation's contract I subsequently, and during the year 1933, received two payments amounting to $1,125.00 and $1,000.00. In accordance with the G. W. G. Corporation contract with Lay which is related as part of the minutes of the corporation, these payments were received for those due in January, 1933. On December 5, 1933, I received $1,243.13 more. That was for interest."

(At this point there was offered in evidence the first page of the bank book showing the deposits of the G. W. G.

Corporation with the National Builders' Bank of Chicago as PETITIONER'S EXHIBIT 4.)

"As a result of a conversation with Mr. Markheim, corporate books were obtained. During 1933 the G. W. G. Corporation made further investments in securities."

(Thereupon a memorandum showing such purchases of securities were made by G. W. G. Corporation in the year 1933, and the subsequent disposal of such of the securities purchased in that year as had been disposed of, was received in evidence as PETITIONER'S EXHIBIT 5.)

On cross-examination MR. GRIFFITHS testified as follows:

"I had a talk with Mr. Markheim about the first of January, 1933; it was after I believed he was going to settle the controversy with Mr. Lay. I was aware at that time I had already sold this stock in 1931 to the Griffiths' Trust and had the benefit of a loss of $92,500.00. In 1933 I think I was in the higher income brackets; I don't remember. I paid $1,000 for the G. W. G. Corporation stock. It was the only asset the G. W. G. Corporation had until it obtained the stock of the Oakridge Cemetery Corporation and then the G. W. G. Corporation issued its obligations to me for $85,000.00. All the assets that the G. W. G. Corporation had was $1,000.00 together with
43 its right against Mr. Lay which I expected was coming in immediately in cash. It came in on the 11th. The first meeting of the stockholders was held in Chicago. I did not have a great deal to do with the meetings as Markheim was handling that and I accepted his advice because he told me he had had a similar case which was put through the Bureau and approved."

HARRY MARKHEIM was called to the stand as a witness on behalf of the petitioner and he testified as follows:

"I am an attorney at law, a member of the firm of Markheim, Parker, and Mueller, of Chicago, Illinois. I have been engaged in the practice of law upwards of twenty-four years. In 1932 I was employed by George Griffiths in connection with some transaction in which Mr. Lay had participated. I later, at the end of 1932, began negotiations with Mr. Lay or his representatives. I had a conversation with Mr. Griffiths with respect to forming an investment company on January 9, 1933. This con-

versation included reference to stock of the Oakridge Cemetery Corporation which was then owned by the John Griffiths Investment Trust. This conversation was at No. 1 North LaSalle Street. Mr. Griffiths and myself were present. In this conversation I stated to Mr. Griffiths that in my judgment the controversy with Lay would be settled within the next two or three days. He previously had informed me that a portion of his stock, I believe it was 5,000 shares, in the Oakridge Cemetery Company had been sold to the John Griffiths Investment Trust. I told Mr. Griffiths that our rights against Lay consisted of a cause of action involving a breach of trust in the general nature of a tort claim, and that in order to effect the settlement it would be necessary to unite the ownership of the stock and the tort claim, or claim for breach of trust, in the same person. I therefore told him it would be essential for him to reacquire the stock that had been sold to the John Griffiths Investment Trust, and he said he would. I then stated to him that if he would consider
organizing an investment company, a personal hold-
44 ing company at that time, that in my judgment his
tax situation could be improved in connection with the impending settlement with Robert Lay by placing it on an installment basis and thus spreading it over a period of years. I explained to him that that benefit was subject to some question because it depended a good deal on how long he lived and what his income might be in succeeding years, and in what bracket he might be, and what the levy of taxes might be in the future years. He asked me if I thought that procedure was all right and would be effective. I told him in my best judgment it would be effective, and I told him about a case I had involving a tax return or transaction in the year 1929 involving a very much bigger transaction and a very much larger tax, in which the matter had been examined by the Department of Internal Revenue and approved.

"We discussed who the directors of the corporation should be, and I suggested in the previous case I had had involving a similar situation the man's initials had been used, and I suggested that he organize the G. W. G. Corporation. I told him that for the purpose of convenience and facility, if he would place that responsibility or confidence in my associates, we would supply the directors at least temporarily. I stated to Mr. Griffiths in my judgment it would not be necessary under the Illinois statute to qualify the company in Illinois for the purpose of consummating the transaction as between himself and the

corporation, or the transaction between the corporation and Lay, because it was an isolated transaction and not within the purview of the Illinois Statute requiring qualification, but he told me he intended to employ this corporation actively and continually over a period of time involving other transactions, and I told him I thought it would eliminate any question if we qualified in Illinois, and he instructed me to do that in due course.

"The bulk of the work of obtaining the charter and holding meetings of directors was done by my partners Milton Mullen and S. J. Albie. I instructed them to secure a charter and have it organized by sending instructions by telegraph or long distance telephone, as we had done in the A. S. W. Corporation, as a charter of the G. W. G. Corporation. The Corporation Trust Company attended to the portion of the formation of the corporation that transpired in Delaware.

"The first meeting in Illinois was held on January 10, 1933. We were advised early in the morning of January 10th by Mr. Reubling or Mr. Smith the corporate organization had been completed and the board of directors elected. On the afternoon of January 10th the negotiations culminated, although as I have said I was confident the day before we would close; and that afternoon or early in the morning of the 11th I commenced the preparation of the papers to effectuate the settlement with Mr. Kohane of Trude and Kohane, who represented Mr. Lay. Petitioner's Exhibit No. 3 is the document that Mr. Kohane and I prepared at that time. The securities recited in petitioner's Exhibit No. 3 were delivered at that time. I obtained two checks payable to the order of George W. Griffiths, drawn on the Harris Saving & Trust Bank, one in the amount of $100,000 and the other in the sum of $80,000, which I personally delivered to Mr. Griffiths. At that time Mr. Kohane stated that he wanted a resolution sustaining the endorsement in blank of the certificate in the name of John Griffiths Investment Trust for 5,000 shares of the common stock of Oakridge Cemetery Corporation."

(This resolution was thereupon introduced in evidence as PETITIONER'S EXHIBIT NO. 6.)

On cross-examination MR. MARKHEIM testified as follows:

"I contacted Lay or his attorneys in the latter part of 1932. I first approached A. M. Johnson who was the business associate of Lay and then president of the National

Life Insurance Company. Trude and Kohane entered the picture in the early part of January, 1933. Our first contact with an attorney was with Mr. Sors, who was attorney for the National Life Insurance Company, with which Lay was associated and after the meeting with Mr. Sors,
46 Trude and Kohane entered the picture, and I would say that was around the 5th day of January, 1933. I first got the impression that a settlement would be made on the 9th day of January. About the 9th, I was reasonably certain the transaction was going through. It was only a matter of drawing the agreement, subject to the fact they weren't committed in any way. By the afternoon of the 10th it was definitely understood that Lay was going to pay. The order for the corporation was given on the 9th and the organization was completed early on the morning of the 10th. A formal meeting was held first in Delaware about 9 o'clock in the morning, 8 o'clock here, and a meeting was held in our office about 10 o'clock or a little later the same morning. The corporate minutes were ready before that hour to present to the board of directors.

"I have had considerable contact with income tax work but I am not a specialist in the sense that a major portion of my time is devoted to that work. The S. W. A. Corporation was a Delaware corporation and I explained to Mr. Griffiths that the transaction with reference to that corporation was almost identical with this case. It was reviewed and approved."

The foregoing evidence, together with the exhibits above shown to have been introduced in evidence, copies of which exhibits are being incorporated in the record proper by the Clerk of the United States Board of Tax Appeals and are hereby incorporated herein by reference, is all of the material evidence adduced at the hearing before the Board of Tax Appeals and the same is approved by the undersigned, J. P. Wenchel, Chief Counsel for the Bureau of Internal Rvenue, as attorney for the Commissioner of Internal Revenue.

J. P. Wenchel,
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

The foregoing evidence, together with the exhibits above shown to have been introduced in evidence, copies of which exhibits are being incorporated in the record proper by the Clerk of the United States Board of Tax Appeals
47 and are hereby incorporated herein by reference, is all of the material evidence adduced at the hearing before

the Board of Tax Appeals and the same is approved by the undersigned as attorney for respondent on review.

Herman A. Fischer,
Herman A. Fischer,
Counsel for Respondent on Review.

The foregoing evidence, together with the exhibits above shown to have been introduced in evidence, copies of which exhibits are being incorporated in the record proper by the Clerk of the United States Board of Tax Appeals and are hereby incorporated herein by reference, is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this ..... day of ....., 1938.

.....
Member, United States Board of Tax Appeals.

Approved and ordered filed this 13 day of Aug., 1938.

(s) J. E. Murdock,
Member.

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $3,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1933

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1934

FIRST NAME AND ADDRESS PLAINLY BELOW

GEORGE W. GRIFFITHS.
(Name)

Room 624 - 228 North La Salle Street.
(Street and number, or rural route)

Chicago. (Post office) Cook (County) Illinois (State)

Do Not Write in These Spaces

File No. 1124

Serial No. 801452

Date (Collector's Stamp)

Cash Check M.O. Certified

First Payment $ 12-9-13

1. Are you a citizen or national? Yes
2. If you are a citizen by virtue of naturalization, where was your certificate issued? —
3. If you are a citizen other than by birth or naturalization, how did you become a citizen? —
4. Give name of husband or wife; Ida S. Griffiths
Husband's address at which you were Chicago, Ill.
5. Were you married and living with husband or wife during your taxable year? Yes
6. If not, were you living apart because of separation decree or written agreement? —
7. How many dependent persons under ten years of age or incapable of self-support received over one-half support from you during your taxable year? One
8. Are you claiming credit for any amount paid to a dependent in connection with the support of a child? —
9. If answer to question 8 is "Yes", give name and address of person to whom you paid such amount. —
10. If answer to question 8 is "Yes", state amount paid during the year, date and amount of each payment, and whether paid in cash or by check. —
11. Amount of personal exemption claimed: no change
12. Basis on which your books are kept: Cash

Occupation: Classification of Item 1, Schedule B: (Check one box only.)
- ☐ Agriculture, stockman, or dairyman
- ☐ Judge or lawyer
- ☐ Technical engineer, chemist, or architect
- ☐ Other professional
- ☐ All other
- ☐ Manufacturer, or other producer
- ☐ Merchant
- ☐ Corporation executive, or manager
- ☐ Clerk, salesman, or employee

INCOME				
1. Salaries, Wages, Commissions, Fees, etc. (State name and address of employer)	Amount received	Income not included in Schedule B		
Salaries and Commissions (Exhibit "A"-1)		14	358	99
2. Income (or Loss) from Business or Profession (From Schedule A)				
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except tax-free covenant bonds)		1	436	15
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source			2424	
5. Income (or Loss) from Partnerships, Syndicates, Pools, etc. (State name, address, and kind of business)				
6. Income from Fiduciaries (State name and address)				
(Exhibit "C")			360	91
7. Rents and Royalties (From Schedule B)				
(a) Profit from Sale of Stocks and Bonds held over two years (From Schedule C (a)) (Exhibit "D")		19	251	56
(b) Profit or Loss from Sale of Other Assets held over two years (From Schedule C (b))				
(c) Profit or Loss from Sale of Capital Assets (If not reported on Item 20). (From Schedule C (c))				
(Exhibit "E")				
8. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of this Act		26	628	92
(b) Domestic Corporations not subject to taxation under Title I of 1932 Act				
(c) Foreign Corporations				
9. Other Income. (State source) (Use separate schedule, if necessary) Instalment Sale (Exhibit "F")		1	875	00
10. Total Income as Items 1 to 11				113 373 18
DEDUCTIONS				
13. Interest Paid			735	53
14. Taxes Paid. (Explain in Schedule B) (Exhibit "G")		2	169	47
15. Losses by Fire, Storm, etc. (Explain in Table at foot of page 2) (Exhibit "H")		19	085	00
16. Bad Debts. (Explain in Schedule B) (Exhibit "I")		48	706	81
17. Contributions. (Explain in Schedule B) (Exhibit "J")		3	692	68
Other Deductions Authorized by Law. (Explain in Schedule B) (Exhibit "K")		3	107	52
Total Deductions as Items 13 to 18				69 436 82
20. Net Income (Item 19 minus Item 19)				43 936 36

AVERAGE BENEFICIARY SERVICE

ATTACH REMITTANCE HERE

INCOME

1. Salaries, Wages, Commissions, Fees, etc. (State name and address of employer)				
Salaries and Commissions (Exhibit "A-1")		14	358	99
2. Income (or Loss) from Business or Profession. (From Schedule C)				
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (Except Tax-free Covenant Bonds)		1	436	15
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source			24	
5. Income (or Loss) from Partnerships, Syndicates, Pools, etc. (State name, address, and kind of business)				
6. Income from Fiduciaries. (State name and address)				
(Exhibit "C")			360	91
7. Rents and Royalties. (From Schedule D)				
(a) Profit from Sale of Stocks and Bonds held one year or less. (From Schedule C (2)) (Exhibit "D")		19	257	56
(b) Profit or Loss from Sale of Other Assets held one year or less. (From Schedule C (2))				
(c) Profit or Loss from Sale of Capital Assets (if not reported on Item 20). (From Schedule C (2))				
(Exhibit "E")				
9. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of 1932 Act.		76	628	92
(b) Domestic Corporations not subject to taxation under Title I of 1932 Act.				
(c) Foreign Corporations.				
10. Other Income. (State nature) (Use separate schedule, if necessary) Instalment Sale (Exhibit "F")		1	875	00
11. TOTAL INCOME IN ITEMS 1 TO 11.				133 373 18
DEDUCTIONS				
12. Interest Paid.			735	53
14. Taxes Paid. (Explain in Schedule E) (Exhibit "G")		2	169	47
15. Losses by Fire, Storm, etc. (Explain in Table at foot of page 4) (Exhibit "H")		19	085	00
16. Bad Debts. (Explain in Schedule E) (Exhibit "I")		48	706	81
17. Contributions. (Explain in Schedule E) (Exhibit "J")		3	692	48
Other Deductions Authorized by Law. (Explain in Schedule E) (Exhibit "K")		3	107	52
TOTAL DEDUCTIONS IN ITEMS 12 TO 18.				69 436 82
20. NET INCOME (Item 19 minus Item 19)				43 936 36

COMPUTATION OF TAX (See Instruction 28)

21. Net Income Subject to Tax (Item 20 above)			43	936	36		
22. Less: Interest on Liberty Bonds, etc. (Item 9)							
23. Dividends (Item 9 (a))	76,628	92					
24. Personal Exemption	2,500	00					
25. Credit for Dependents	400	00					
26. Total of Items 22 to 25			79	528	92		
27. Balance subject to Normal Tax (Item 21 minus 26)				NONE		21. Normal Tax (4% of Item 27)	NONE
28. Amount taxable at 4% (not over $4,000)				NONE		22. Normal Tax (8% of Item 28)	NONE
29. Amount taxable at 8% (Item 27 minus 28)				NONE		23. Surtax on Item 20 (see instruction 28)	3 687 91
30. Amount of Capital Net Gain or Loss (if any reported on Item 8 (c)) (From Schedule C (2)) Exhibit "L"			19	585	43	24. Tax on Net Income (total of Items 21 to 23)	
						25. Adjustment for Capital Gain or Loss (12½% of Item 30)	2 448 18
						26. Total Tax (total of or difference between Items 24 and 25)	
						27. Less: Income Tax Paid at Source (3% of Item 6)	
						28. Income Tax Paid to a foreign country or U.S. possession	
						29. Balance of Tax (Item 26 minus Items 27 and 28)	1 239 73

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief is a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the National Industrial Recovery Act and the Regulations issued thereunder.

(See Instruction 27) (If return is made by fiduciary, affidavit must be sworn to on this line)

Sworn to and subscribed before me this 15th day of February 1934

Anna Keene Notary Public

(Signature of officer administering oath)

MY COMMISSION EXPIRES

(Address of agent)

An amended return must be marked "Amended" at top of page 1, 1933 credits and drafts will be accepted only if payable at par.

23

2-1

SCHEDULE A—INCOME (OR LOSS) FROM BUSINESS OR PROFESSION (See Instruction 2)

1. Total receipts from business or profession (state kind of business)

Cost of Goods Sold

2. Labor
3. Material and supplies
4. Merchandise bought for sale
5. Other costs (itemize below or on separate sheet)
6. Plus inventory at beginning of year
7. Total (Lines 2 to 6)
8. Less inventory at end of year
9. Net Cost of Goods Sold (Line 7 minus Line 8)

Enter "C", or "C or M", on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Other Business Deductions

10. Salaries not included as "Labor" in Line 2 (do not deduct compensation for your services)
11. Interest on business indebtedness to others
12. Taxes on business and business property
13. Losses (explain in table at foot of page)
14. Bad debts arising from sales or services
15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)
16. Rent, repairs, and other expenses (itemize below or on separate sheet)
17. Total (Lines 10 to 16)
18. Total Deductions (Line 9 plus Line 17)
19. Net Profit (or Loss) (Line 1 minus Line 18) (Enter as Item 2)

Explanation of deductions claimed on Lines 5 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. Kind of Property	2. Amount Received	3. Cost or Value as of March 1, 1913, Whichever Greater	4. Depreciation (Explain in table at foot of page)	5. Remarks	6. Other Expenses (Itemize below)	7. Net Profit (Enter as Item 7)

Explanation of deductions claimed in Column 6

SCHEDULE C—PROFIT OR LOSS FROM SALE OF STOCKS, BONDS, REAL ESTATE, ETC. (See Instruction 8)

1. Kind of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. Amount Realized	5. Cost	6. March 1, 1913, Value if Acquired Prior to That Date	7. Cost of Improvements Subsequent to Acquisition or March 1, 1913	8. Depreciation Allowed (or Allowable) Since Acquisition or March 1, 1913	9. Net Profit or Loss
(a) Stocks and Bonds* Held Two Years or Less:								
						x x x x x x	x x x x x x	
						x x x x x x	x x x x x x	
Total (a) (Transfer net profit to Item 8 (a))	x x x x x x	x x x x x x				x x x x x x	x x x x x x	
(b) Other Assets Held Two Years or Less:								
Total (b) (Transfer net profit or loss to Item 8 (b))	x x x x x x	x x x x x x						
(c) Capital Assets:								
Total (c) (Transfer net gain or loss to Item 8 (c) or 20)	x x x x x x	x x x x x x						

* As defined in Section 22 (t), 1932 Act.

State how property was acquired

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

1. Obligations or Securities	2. Amount Owned	3. Interest Received or Accrued	4. Principal Amount Exempt from Taxation	5. Amount Owned in Excess of Exemption	6. Interest on Amount in Excess of Exemption (Enter as Item 4)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia			All	x x x x x x	x x x x x x
Securities issued under Federal Farm Loan Act, or under such Act as amended, and obligations of United States possessions			All	x x x x x x	x x x x x x
Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917			All	x x x x x x	x x x x x x
(d) Liberty 4% and 4½% Bonds and Treasury Bonds			$5,000		
(e) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	x x x x x x	x x x x x x

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 15, 17, AND 18

SCHEDULE C—PROFIT OR LOSS FROM SALE OF STOCKS, BONDS, REAL ESTATE, ETC. (See Instruction E)

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Amount Realized	5. Cost	6. March 1, 1913, Value if Acquired Prior to That Date	7. Cost or Appropriate Adjustment on March 1, 1913	8. Depreciation Allowed (or Allowable) Since Acquisition on March 1, 1913	9. Net Profit or Loss
(a) Stocks and Bonds* Held Two Years or Less:	Mo. Day Year	Mo. Day Year						
			$	$	$	xxxxx	xxxxx	$
						xxxxx	xxxxx	
Total (a) (Transfer net profit to Item 8 (a))	xxxxx	xxxxx	$	$	$	xxxxx	xxxxx	$
(b) Other Assets Held Two Years or Less:								
			$	$	$	$	$	$
Total (b) (Transfer net profit or loss to Item 8 (b))	xxxxx	xxxxx	$	$	$	$	$	$
(c) Capital Assets:								
			$	$	$	$	$	$
Total (c) (Transfer net gain or loss to Item 8 (c) or 20)	xxxxx	xxxxx	$	$	$	$	$	$

*As defined in Section 23 (t), 1932 Act.
State how property was acquired

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

1. Obligations or Securities	2. Amount Owned	3. Interest Received or Accrued	4. Interest Amount Exempt from Taxation	5. Amount Owned, as Shown on Statement	6. Interest on Amount in Excess of Bonds (Same as Item 9)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$	$	All	xxxxxx	xxxxxx
Securities issued under Federal Farm Loan Act, or under such Act as amended, and obligations of United States possessions			All	xxxxxx	xxxxxx
Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917			All	xxxxxx	xxxxxx
(d) Liberty 4% and 4½% Bonds and Treasury Bonds			$5,000	$	$
(e) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	xxxxxx	xxxxxx

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Value	4. Proportion Cost Applicable to Buildings	5. Cost (Exclusive of Land)	6. March 1, 1913, Value (If Acquired Prior to That Date) (Exclusive of Land)	7. Depreciation Allowed (or Allowable) on Prior Years	8. Depreciation Allowable this Year
				$	$	$	$

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 15

1. Kind of Property	2. Date Acquired	3. Cost or Value as of March 1, 1913, Whichever Basis	4. Insurance Compensation	5. Depreciation Allowable Since Acquisition	6. Unadjusted Adj. Salvage Value	7. Deductible Loss
		$	$	$	$	$

RECEIVED
JUL 7 1934
Internal Revenue Agent in Charge
CHICAGO, ILLINOIS

24-25

25

50 **EXHIBIT "A".**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement Showing Automobile Expenses Paid During Year Ended December 31, 1933.

(1) Salary of Chaffeur, Repairs, Supplies, Expense, Insurance, Etc.	$4,638.17
(2) Employed For Business 50%	$2,319.09

51 **EXHIBIT "A"-1.**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement Showing Salaries, Wages, Commissions, Etc.

(1) Salary John Griffiths & Son Company, 228 North La Salle Street, Chicago, Illinois,	$10,000.00
Less:	
(2) Auto Expenses (Exhibit "A")	2,319.09
(3) Net Salary	$ 7,680.91
(4) Commissions John Griffiths & Son Company, (Exhibit "B")	9,321.92
(5) Salary G. W. G. Corporation, 228 North La Salle Street, Chicago, Illinois,	10,000.00
(6) Salary John Griffiths Investment Trust, 228 North La Salle Street, Chicago, Illinois,	6,000.00
(7) Total	$14,358.99

52 **EXHIBIT "B".**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement Showing Commissions.

(1)	Net Profit on Jobs Fiscal Year Ended July 31, 1933	$179,852.60
	Less:	
(2)	Administrative Expenses	211,184.07
(3)	Income for Commissions	$ 31,331.47
(4)	Commissions of George W. Griffiths	$ 9,321.92

53 **EXHIBIT "C".**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement Showing Rents Received

(1)	Rents Received 3848 North Nordica Avenue, Chicago, Illinois		$ 27.50
	Less:		
(2)	Expenses For Decorating, Repairs, Etc.	$243.66	
(3)	Depreciation on Cost, 3% X $4,825.00	144.75	388.41
(4)	Net Loss		$360.91

54 **EXHIBIT "D."**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement Showing Gain or Loss on Sale of Securities Year Ended December 31, 1933.
(Held Two Years or Less)

Kind of Property	Date Acquired	Date Sold	Amount Realized	Cost	Net Profit	Net Loss
(1) E. I. Du Pont De Nemour Common Stock (300 Shares)	4-28-33	9-22-33	$24,824.15	$	$	$
(2) E. I. Du Pont De Nemour Common Stock (200 Shares)		11-23-33	17,550.00	23,075.00	19,299.15	—
(3) United States Treasury Bills	3-1-33	3-15-33	54,950.35	54,997.94	—	47.59
(4) Totals			$97,324.50	$78,072.94	$19,299.15	$47.59
(5) Forwarded					47.59	
(6) Net Profit					$19,251.56	

55 **EXHIBIT "E".**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement Showing Dividends Received Year Ended December 31, 1933

(1)	E. I. Du Pont De Nemour Common Stock	$ 731.42
(2)	General Electric Common Stock	97.50
(3)	John Griffiths & Son Company	55,800.00
(4)	G. W. G. Corporation	20,000.00
(5)	Total Dividends Received	$76,628.92

56 **EXHIBIT "F".**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement
Showing
Sale of Personal Property on Instalment Basis Held Less Than Two Years

(1)	5,000 Shares Oakridge Cemetery Corporation Common Stock Purchased at Cost of	1/10-33	$ 8,000.00
(2)	Sold on Instalment Basis For Gross Price of	$85,000.00	
	Less:		
(3)	Legal Fees	2,000.00	
(4)	Net Selling Price on Instalment Basis		83,000.00
(5)	Gross Unrealized Profit		$75,000.00
(6)	Amount Received in 1933		$ 2,125.00
(7)	Amount to be Reported in 1933— $75,000.00 / $85,000.00 X $2,125.00=		$ 1,875.00

57 **EXHIBIT "G".**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement
Showing
Taxes Paid

(1)	Club Taxes	$ 195.42
(2)	City and State Taxes	574.18
(3)	Federal Tax on Checks	14.15
(4)	Real Estate Taxes	326.32
(5)	Stamp Taxes	59.40
(6)	Dividend Tax	1,000.00
(7)	Total	$2,169.47

EXHIBIT "M"

[redacted]

---oOo---

STATEMENT
SHOWING

---oOo---

LOSS FROM WORTHLESS SECURITIES

			Cost
(1)	S. W. Straus & Company	100 Shares	$ 5,675.00
(2)	S. W. Straus Investing Corporation	200 Units	11,600.00
(3)	Midas Oil Company		50.00
(4)	Chicago Yacht Club Underwriting		1,250.00
(5)	T o t a l		$18,575.00

EXHIBIT "K"

GEORGE T. GRIFFITHS
228 NORTH LA SALLE STREET
CHICAGO, ILLINOIS

—ooOoo—

STATEMENT
SHOWING

—ooOoo—

BAD DEBTS

(1)	Louis C. Joyce		$22,793.99
(2)	Carlton F. Perry		150.00
(3)	Charles F. Van Sicklen		3,000.00
(4)	Joseph F. Hill		1,000.00
(5)	Raymond D. Smith		600.00
(6)	Prindle and Whitely		11,162.82
(7)	T o t a l		$40,706.81

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EXHIBIT "J".

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement
Showing
Donations

(1)	Chicago Heart Association	$ 2.00
(2)	The Racquet Club	100.00
(3)	Kenwood Lodge Masonic Order	.50
(4)	St. Lukes Hospital	7.00
(5)	Church Agency	226.00
(6)	Thru John Griffiths & Son Company—49% X $6,851.00—	3,356.99
(7)	Total	$3,692.49

EXHIBIT "I"

GEORGE W. GRIFFITHS
228 NORTH LA SALLE STREET
CHICAGO, ILLINOIS

---oo0oo---

STATEMENT
SHOWING

---oo0oo---

OTHER EXPENSES

(1) Legal and Accounting $2,601.52

(2) Life Insurance Premiums Paid on the Life of a Debtor 506.00

(3) Total Other Expenses $3,107.52

62 **EXHIBIT "L".**

George W. Griffiths
228 North La Salle Street
Chicago, Illinois

Statement
Showing
Gain or Loss on Sale of Securities Year Ended December 31, 1933 (Held More Than Two Years)

Kind of Property	Date Acquired	Date Sold	Amount Realized	Cost	Net Profit	Net Loss
(1) Oakridge Abbey Common Stock (250 Shares)	1925) and 1926)	1-10-33	$52,947.13	$68,750.00	—	$15,802.87
(2) Oakridge Cemetery Corporation (4,250 Shares)						
(3) Chicago Corporation Common (100 Shares)	9-7-29	12-27-33	217.46	4,000.00	—	3,782.54
(4) Totals			$53,164.59	$72,750.00	—	$19,585.41

63 Notice to Individual Taxpayers

George W. Griffiths,
228 N. La Salle St.,
Chicago, Illinois.

This form should be executed and filed as a part of Individual Income Tax Form 1040 for the calendar year 1933. If you merely received advice from some person or persons employed to assist in the preparation of the return, the name and address of your advisor, together with a statement showing the extent to which such assistance or advice was received, is sufficient. If your return was actually prepared by any such person or persons, this form must be signed and sworn to by such person or persons.

Did you employ anyone especially to prepare or advise in the preparation of your income return for the calendar year 1933? (Answer "yes" or "no") No. If so, give

name and address of such person or persons and state to what extent such assistance or advice was received:

I, acting as Advisor (full time employee) for the hereto
(Attorney or advisor)

subscribed taxpayer, affirm that I prepared the return, that the information set out in the return and accompanying schedules, if any, correctly and truly represents the information furnished or discovered by me during the course of preparation of the return, and that such information is true to the best of my information and belief.

David Wyland
David Wyland
(Attorney or advisor)
Rm. 624—228 N. La Salle St.,
Chicago, Illinois.
(Address)

Sworn to and subscribed before me this 15th day of February, 1934.

Clarence V. Reeves,
(Signature of officer administering oath)
(Notarial Seal) *Notary Public.*
(Title)

My Commission Expires April 18, 1936.

Form 1099
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

INFORMATION RETURN FOR CALENDAR YEAR 1933

INSTRUCTIONS TO PAYORS

Prepare one of these forms for each payee in accordance with the instructions on return Form 1096.

Forward with return Form 1096 to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before February 15, 1934.

To Whom Paid (Name and address): George W. Griffiths, 1500 Lake Shore Drive, Chicago, Illinois

Kind and Amount of Income Paid				
Salaries, Wages, Fees, Commissions, Bonuses (If single $1,500 or more, if married $2,500 or more)	Interest on Notes, Mortgages, etc. (If single $1,000 or more, if married $2,500 or more)	Rents and Royalties (If single $1,000 or more, if married $2,500 or more)	Dividends ($100 or more)	Foreign Items and Other Income (If single $1,000 or more, if married $2,500 or more)
$10,000.00	$	$	$55,300.00	

Check if possible
☐ SINGLE
☑ MARRIED

By Whom Paid (Name and address): JOHN GRIFFITHS & SON CO., 228 N. La Salle Street, CHICAGO, ILL.

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Form 1099
TREASURY DEPARTMENT
Internal Revenue Service

INFORMATION RETURN FOR CALENDAR YEAR 1933

INSTRUCTIONS TO PAYORS

Prepare one of these forms for each payee in accordance with the instructions on return Form 1096.

Forward with return Form 1096 to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before February 15, 1934.

To George W. Griffiths,
WHOM PAID (Name and address) 228 North La Salle Street,
Chicago, Illinois.

KIND AND AMOUNT OF INCOME PAID

Salaries, Wages, Fees, Commissions, Bonuses (If single $1,000 or more, if married $2,500 or more)	Interest on Notes, Mortgages, etc. (If single $1,000 or more, if married $2,500 or more)	Rents and Royalties (If single $1,000 or more, if married $2,500 or more)	Dividends ($100 or more)	Foreign Items and Other Income (If single $1,000 or more, if married $2,500 or more)
$ 10,000.00	$ 1,243.13	$	$ 20,000.00	$ 2,125.00

Check if payable
☐ SINGLE
☒ MARRIED

BY WHOM PAID (Name and address) G. W. G. Corporation,
228 North La Salle Street, (Room 624)
Chicago, Illinois.

(3—1933) . . . . . GOVERNMENT PRINTING OFFICE: 1933

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Form 69
TREASURY DEPARTMENT
Internal Revenue Service

INFORMATION RETURN FOR CALENDAR YEAR 1933

INSTRUCTIONS TO PAYORS

Prepare one of these forms for each payee in accordance with the instructions on return Form 1096.

Forward with return Form 1096 to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before February 15, 1934.

To Whom Paid (Name and address)	George M. Griffiths, Room 624 - 228 North La Salle Street, Chicago, Illinois.

Kind and Amount of Income Paid

Salaries, Wages, Fees, Commissions, Bonuses (If single $1,500 or more, if married $2,500 or more)	Interest on Notes, Mortgages, etc. (If single $1,000 or more, if married $2,500 or more)	Rents and Royalties (If single $1,000 or more, if married $2,500 or more)	Dividends ($100 or more)	Foreign Items and Other Income (If single $1,000 or more, if married $2,500 or more)
$ 6,000.00 Check if possible ☐ SINGLE ☒ MARRIED	$	$	$	$

By Whom Paid (Name and address)	The John Griffiths Investment Trust, 228 North La Salle Street, Chicago, Illinois.

45

45

67 Return of Information

By Brokers and Other Agents—Calendar Year 1933

Form 1100
Treasury Department
Internal Revenue Service

Name and address of guarantor of account:

Names and addresses of others with power to make withdrawals of cash, securities, or commodities from the account:

Instructions

Prepare this form in accordance with the instructions on return Form 1100-A. Forward with return Form 1100-A to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before February 15, 1934.

Name and address of customer and title of account:
George W. Griffiths
228 N. La Salle St.
Chicago, Ill.

Total purchases, $31,762.50 Total sales, $217.46.

Name and address of broker or agent:
A. D. Plamonedon Jr.
208 S. La Salle St.

68 Return of Information.

By Brokers and Other Agents—Calendar Year 1933

Form 1100
Treasury Department
Internal Revenue Service

Name and address of guarantor of account:
No.

Names and addresses of others with power to make withdrawals of cash, securities, or commodities from the account:
No.

Instructions

Prepare this form in accordance with the instructions on return Form 1100-A. Forward with return Form 1100-A

to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before February 15, 1934.

Name and address of customer and title of account:
Geo. W. Griffiths
228 N. La Salle St.
Chicago, Ill.

Total purchase, $..... Total sales, $24,825.00.

Name and address of broker or agent:
James E. Bennett & Co.
332 S. La Salle St.
Chicago, Ill.

69 E. I. duPont de Nemours & Company
Incorporated

Wilmington, Del. September 15, 1933 No. 19835

Two Hundred Thirty Seven and***
50/100 Dollars*** $237.50
500

George W. Griffiths***
228 N. La Salle St.,
Chicago, Ill.

Common Stock Dividend No. 72.

Paid by check on The Chemical Bank & Trust Co. New York City.

70 PETITIONER'S EXHIBIT 2a.

I, Clarence H. Reeves, do hereby certify that I am the Secretary of G. W. G. Corporation, a corporation organized under the laws of the State of Delaware, and that, as such Secretary, I am in charge of the minutes of its corporate proceedings and of its corporate seal.

And I do hereby further certify that in the minutes of its first meeting its Board of Directors, as contained in the said corporate minute book in my possession, there appears the following:

G. W. G. Corporation.
Minutes of First Meeting of Board of Directors.

* * * *

The first meeting of the Board of Directors of G. W. G. Corporation was held at the office of Markheim and Allie,

Suite 2121, No. 1 North LaSalle Street, in Chicago, Illinois, on January 10, 1933, at 10:45 A. M., Central Standard Time.

There were present:
Stephen J. Allie
Milton Mallin
Edward F. Wallbaum
constituting all of the directors.

* * * * * * Upon motion duly made and seconded, the following resolution was unanimously adopted:

Whereas, George W. Griffiths, of Chicago, Illinois, has offered to sell to this corporation Five Thousand (5,000) shares of the capital stock of Oakridge Cemetery Corporation, an Illinois corporation, and to assign to the corporation any rights he may have against Robert D. Lay to require said Robert D. Lay to purchase said stock, in consideration of the payment to said George W. Griffiths in the sum of Eighty-five Thousand Dollars ($85,000.00), payable in installments over a period of forty (40) years, and the agreement of this corporation to assume and per-
71 form the obligations of said George W. Griffiths to pay E. H. Harrison Fifteen Per Cent (15%) of the net amount of money (after the payment of all expenses) received on the sale of said stock to said Robert D. Lay, in accordance with the draft of agreement hereinafter set forth; and

Whereas, It is the sense of the Directors that this corporation should purchase such stock and the rights of said George W. Griffiths against Robert D. Lay,

Now, Therefore, Be It Resolved, That the President or Vice President of this corporation be and he is hereby authorized, on behalf of this corporation, forthwith to enter into an agreement with said George W. Griffiths, covering the purchase of said shares of stock and the rights of said George W. Griffiths against said Robert D. Lay, as follows, to wit:

This Memorandum of Agreement, Made this tenth day of January, 1933, between George W. Griffiths, of Chicago, Illinois, and G. W. G. Corporation, a Delaware corporation.

Witnesseth:

First: Said George W. Griffiths hereby sells to said G. W. G. Corporation Five Thousand (5,000) shares of the capital stock of Oakridge Cemetery Corporation, an Illinois corporation, and assigns to said corporation any rights

said George W. Griffiths may have against Robert D. Lay to require said Robert D. Lay to purchase said stock, and said G. W. G. Corporation hereby purchases said Five Thousand (5,000) shares of the capital stock of said Oakridge Cemetery Corporation, and hereby agrees to pay therefor the sum of Eighty-five Thousand Dollars ($85,000.00), and to assume and perform the obligations of said George W. Griffiths to E. H. Harrison to pay said E. H. Harrison Fifteen Per Cent (15%) of the amount of money (after the payment of all expenses) received on the sale of said stock to said Robert D. Lay, and in consummation of said sale said George W. Griffiths has, concurrent with the execution hereof, delivered to said corporation, receipt whereof by said corporation is hereby acknowledged, Certificate No. 1003, evidencing Five Thousand (5,000) shares of said stock, standing in the name of John Griffiths Investment Trust, and endorsed by the Trustees of said John Griffiths Investment Trust in blank.

72 Second: Said G. W. G. Corporation agrees to pay said sum of Eighty-five Thousand Dollars ($85,000.00) as follows: The sum of One Thousand Dollars ($1,000.00) concurrently with the execution hereof, receipt whereof is hereby acknowledged; the sum of Eleven Hundred Twenty-five Dollars ($1125.00) on January 15, 1933; and the sum of Twenty-one Hundred Twenty-five Dollars ($2125.00) on the fifteenth day of January of each year thereafter, until said entire sum of Eighty-five Thousand Dollars ($85,000.00) is paid.

Said G. W. G. Corporation further agrees to pay interest on said deferred installments at the rate of Three Per Cent (3%) per annum from the date hereof, payable semi-annually on the fifteenth day of January and the fifteenth day of July in each year on the full amount of the unpaid deferred installments.

In Witness Whereof, the parties have executed this memorandum the day and year first above written.

(Sgd) G. W. Griffiths (Seal)

G. W. G. Corporation,
By Stephen J. Allie,
Its ..... *President.*

(Here are attached $25 of United States documentary stamps, each with the date January 10, 1933 written thereon.)

Upon motion duly made, seconded and carried, it was

Resolved, That the proper officers of this corporation be and they are hereby authorized and directed, on behalf of

this corporation and under its Corporate Seal to make and file such certified report or other instrument as may be required by law to be filed in any state, territory or dependency of the United States, or in any foreign country in which said officers may find it necessary or expedient to file the same to authorize the corporation to transact business in such state, territory, dependency or foreign country.

Upon motion duly made, seconded and carried, it was
73 Resolved, That the Treasurer be and he is hereby authorized to pay all fees and expenses incident to and necessary for the organization of this corporation.

Upon motion duly made, seconded and carried, the meeting adjourned.

In witness whereof I have hereunto subscribed my name as such Secretary and affixed the corporate seal of said corporation this 9th day of February, 1937.

Clarence H. Reeves,
(Seal) *Secretary.*

74 PETITIONER'S EXHIBIT 2b.

I, Clarence H. Reeves, do hereby certify that I am the Secretary of G. W. G. Corporation, a corporation organized under the laws of the State of Delaware, and that, as such Secretary, I am in charge of the minutes of its corporate proceedings and of its corporate seal.

And I do hereby further certify that in the minutes of a meeting of its Board of Directors which was held on January 11, 1933 at ten o'clock A. M., as contained in the said corporate minutes book in my possession, there appears the following:

Minutes of a Special Meeting of the Board of Directors

"A special meeting of the Board of Directors of G. W. G. Corporation was held at the office of the corporation, Suite 624 Number 228 North La Salle Street, in Chicago, Illinois, on January 11, 1933, at 10:00 A. M., pursuant to written waiver of notice of said meeting signed by all of the directors of said corporation:

There were present:

Stephen J. Allie
Milton Mallin
Edward F. Wallbaum

constituting all of the directors."

"Upon motion duly made and seconded, the following resolution was unanimously carried:

Whereas, Robert D. Lay, of Chicago, Illinois, has offered to purchase 5,000 shares of the capital stock of Oakridge Cemetery Corporation, an Illinois Corporation, belonging to this corporation, at the price of $100,000 for said 5,000 shares, payable in cash; and

Whereas, it is the sense of the directors that this corporation should sell such stock;

75 Now, Therefore, Be It Resolved That George W. Griffiths be and he is hereby authorized on behalf of this corporation forthwith to sell 5,000 shares of the capital stock of Oakridge Cemetery Corporation, an Illinois corporation, to Robert D. Lay, for the sum of $100,000, payable in cash, and to deliver unto said Robert D. Lay certificates for said shares of stock upon the receipt of the purchase price, and said George W. Griffiths is hereby authorized to execute said transaction either in his own name or in the name of this corporation, and to do each and every thing which may be necessary or desirable for the purpose of consummating said sale;

Be It Further Resolved that the Treasurer of this corporation be and he is hereby directed to invest the proceeds received from the sale of said stock on behalf of this corporation in accordance with the objects and purposes of this corporation as set forth in its charter.

There being no further business to come before the meeting, upon motion duly made, seconded and carried, the meeting adjourned.

(Sgd) Edward F. Wallbaum,
Secretary.

In Witness Whereof I have hereunto subscribed my name as such Secretary and affixed the corporate seal of said corporation this 9th day of February, 1937.

Clarence H. Reeves,
(Seal) *Secretary.*

76 PETITIONER'S EXHIBIT 2c.

I, Clarence H. Reeves, do hereby certify that I am the Secretary of G. W. G. Corporation, a corporation organized under the laws of the State of Delaware, and that, as such Secretary, I am in charge of the minutes of its corporate proceedings and of its corporate seal.

And I do hereby further certify that in the minutes of a meeting of its Board of Directors which was held on Jan-

uary 18, 1933 at ten o'clock A. M., as contained in the said corporate minutes book in my possession, there appears the following:

Minutes of a Special Meeting of the Board of Directors

"A special meeting of the Board of Directors of G. W. G. Corporation was held at the office of the Company, No. 228 North LaSalle Street, Chicago, Illinois, on January 18, 1933, at 10:00 A. M., pursuant to written waiver of notice of said meeting, signed by all of the directors of said corporation.

There were present:

Stephen J. Allie
Milton Mallin
Edward F. Wallbaum

constituting all of the directors.

Mr. George W. Griffiths, the Treasurer, reported to the Board that he had sold Five Thousand (5,000) shares of the capital stock of Oakridge Cemetery Corporation, an Illinois corporation, to Robert D. Lay, for One Hundred Thousand Dollars ($100,000.00), pursuant to a resolution adopted by the Board of Directors at their meeting held on January 11, 1933, and that pursuant to authority vested in him by the Board in said resolution he had executed said transaction in his own name. He further reported that he had deposited the proceeds of said sale, being the sum of One Hundred Thousand Dollars ($100,000.00), to the account of the company with the National Builders Bank of Chicago.

77 Thereupon, upon motion duly made, seconded and unanimously carried, it was

Resolved, That the sale of Five Thousand (5,000) shares of the capital stock of the Oakridge Cemetery Corporation, belonging to this company, to Robert D. Lay, for the sum of One Hundred Thousand Dollars ($100,000.00), be and the same is hereby approved, and that all of the acts of the Treasurer in consummating said sale be and the same are hereby fully ratified, approved and confirmed as and for the acts of this corporation.

The chairman then advised the Board that the Company had incurred an obligation to E. H. Harrison for Fifteen Per Cent (15%) of the amount of money (after the payment of all expenses) received on the sale of said Five

Thousand (5,000) shares of capital stock of Oakridge Cemetery Corporation to Robert D. Lay.

Thereupon, upon motion duly made, seconded, and unanimously carried, it was

Resolved, That the Treasurer of this corporation be and he is hereby authorized and directed to pay to E. H. Harrison the sum of Fourteen Thousand Five Hundred Sixty-six and 08/100 Dollars ($14,566.08) from the proceeds of the sale of Five Thousand (5,000) shares of the capital stock of Oakridge Cemetery Corporation to Robert D. Lay.

There being no further business to come before the meeting, the meeting thereupon, on motion duly made, seconded and unanimously carried, adjourned.

(Sgd) Edward F. Wallbaum,
Secretary.

In Witness Whereof I have hereunto subscribed my name as such Secretary and affixed the corporate seal of said corporation, this 9th day of February, 1937.

Clarence H. Reeves,
(Seal) *Secretary.*

78 PETITIONER'S EXHIBIT 3.

For and In Consideration of the sum of One hundred eightly thousand dollars ($180,000) paid this day by Robert D. Lay to me, receipt of which is hereby acknowledged by me, I, the undersigned do hereby sell, assign, transfer, convey and deliver to Robert D. Lay, the following stock certificates and promissory notes duly endorsed, and all my right, title and interest in and to the same:

Certificate No. 22 for Two hundred fifty (250) shares of the common stock of Oakridge Abbey, issued to George W. Griffiths, and endorsed in blank.

Certificate No. 1003 for 5,000 shares of the common stock of Oakridge Cemetery Corporation issued to John Griffiths Investment Trust, and endorsed in blank.

Promissory note of Oakridge Cemetery Corporation for Fourteen thousand dollars ($14,000), dated February 11th, 1929, payable on demand and made payable to George W. Griffiths.

Promissory note of Oakridge Cemetery Corporation for Fourteen hundred dollars ($1400), dated August 10th, 1932, due on demand and made payable to George W. Griffiths.

The delivery of which said certificates of stock and promissory notes is acknowledged by the said Robert D. Lay. And I do further sell, assign, transfer and convey to said Robert D. Lay all my right, title and interest in and to Certificate No. 867 for Four thousand two hundred fifty (4,250) shares of the common capital stock of Oakridge Cemetery Corporation issued to George W. Griffiths, which said certificate is now held by National Builders Bank, as security for the payment of certain bonds mentioned in
79 a certain collateral trust agreement between Oakridge Cemetery Corporation and Union Bank of Chicago, under date of February 15th, 1922, as amended, and to evidence said sale, transfer and conveyance of all of the right, title and interest of the undersigned in and to said certificate of stock, the undersigned has, concurrently with the execution hereof, delivered to said Robert D. Lay, an assignment executed by him of all his said right, title and interest in and to said certificate and also a notice to the National Builders Bank, giving notice of the sale, assignment and transfer of said stock certificate and the interest therein of the undersigned, and authorizing and directing the said National Builders Bank to deal with the said Robert D. Lay as the owner of said certificate, the delivery of said assignment and notice being acknowledged by the said Robert D. Lay.

And as part consideration for the payment to the undersigned by the said Robert D. Lay of the said sum of One hundred eighty thousand dollars ($180,000), I, the undersigned, George W. Griffiths, for myself, my heirs, administrators and assigns, do hereby release and forever discharge the said Robert D. Lay, his heirs, executors, administrators and assigns, from all actions, causes of action, contracts, debts, liabilities, obligations, suits, claims and demands whatsoever which I, the undersigned, ever had, now have, or which I, my heirs, executors, administrators or assigns or any of them, hereafter can, shall or may have for or by reason of any act of omission, cause, matter or thing whatsoever, from the beginning of the World to the date hereof.

In Witness Whereof I, the undersigned, George W. Griffiths, have set my hand and seal this 11 day of January, A. D. 1933.

George W. Griffiths (Seal)

State of Illinois }
County of Cook } ss.

I, Milton Mallin, a Notary Public in and for the County and State aforesaid, Do Hereby Certify that George W. Griffiths, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 11th day of January 1933.

Milton Mallin,
Notary Public.

(Seal)

NATIONAL BUILDERS BANK
OF CHICAGO

IN ACCOUNT WITH

G.W.G. Corporation
221 No LaSalle St.
Room 624

In tender of items by the above named depositor, and the Bank's entry covering such items, constitutes an agreement on the part of said depositor: that in receiving items for deposit or collection, this bank acts only as the depositor's collecting agent and assumes no responsibility beyond the exercise of due care; that all items are credited conditionally and subject to final payment in cash or current credit; that cheques collectible through the Chicago Clearing House will be carried over for presentation on the following business day; that this bank will not be liable for default or negligence of its duly selected correspondents nor for items in transit, and each correspondent so selected shall not be liable except for its own negligence; that this bank or its correspondents may send items, directly or indirectly, to any bank including the payor and accept its draft or credit as conditional payment in lieu of cash; and that it may charge back, any items at any time before final payment whether or not the items can be or are returned to the depositor, also any items drawn on this bank not good at close of business on day deposited.

Exhibit No. 4

NATIONAL BUILDERS BANK
OF CHICAGO

1933			
Jan 10			1000 =
1/12			100 000
3/25			50000
4-3-33			30000 -
4/5			50000
9/13			4379 -
			10000
APR 4 1933			8000 -
12-31			1500 -
JAN - 3 1934			1041750
	M.		460415
			4688184
APR - 4 1938		N	750 -
			310 -
DEC 31 1935		N.	1584 -
9/17			100
DEC 19 1936			600 -
DEC 29 1939			7500 -

U. S. BOARD OF TAX APPEALS
DIV. 3 DOCKET 82624
ADMITTED IN EVIDENCE
JUN 24 1937
PETITIONER EXHIBIT 4

52

82 PETITIONER'S EXHIBIT 5.

G. W. G. Corporation

Schedule of Securities Purchased 1933 with Sale Dates.

Name of Security	Number of Shares Purchased	Date Purchased	Number of Shares Sold	Date Sold	Cash	Selling Price	Gain or Loss
Oakridge Cemetery Stock	5000	1-10-33	5000	1-11-33	99,566.08	100,000.00	433.92
National Dairy Products Common Stock	500	4-28-33	500	6-12-33	5,100.00	6,798.00	1,698.00
Union Carbide and Carbon Common Stock	500	4-28-33	500	9-25-33	15,275.00	24,380.00	9,105.00
Eastman Kodak Common Stock	500	4-28-33	500	3-16-34	30,575.00	45,355.00	14,780.00
Youngstown Sheet & Tube Common Stock	1700	6-15-33	1700	12-28-34	52,705.00	31,317.82	21,387.18
Youngstown Sheet & Tube Common Stock	800	6-15-33	800	2-11-35	24,670.00	13,493.71	11,176.29
General Motors Common Stock	1500	4-28-33	1500	2-11-35	26,437.50	44,956.58	18,519.08
Totals					254,328.58	266,301.11	11,972.53
Chapin & Gore Stock	250	10-19-33			25,000.00	This Stock Still Held	

83 PETITIONER'S EXHIBIT 6.

We, the undersigned, John Griffiths and George W. Griffiths, the qualified and acting Trustees of the John Griffiths Investment Trust, do hereby certify that certificate No. 1003 for five thousand (5,000) shares of the capital stock of Oakridge Cemetery Corporation, an Illinois corporation, standing in the name of John Griffiths Investment Trust, was duly endorsed in blank by John Griffiths and George W. Griffiths, as Trustees of said John Griffiths Investment Trust, pursuant to a resolution of said trust adopted by the concurrence of both of the Trustees thereof, in accordance with the requirements of the instrument creating the trust.

Dated at Chicago, Illinois, January 11th, 1933.

John Griffiths,
Geo. W. Griffiths,
Trustees of said John Griffiths Investment Trust.

Filed Feb. 9, 1938. 19 UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82624) • •

Promulgated February 9, 1938.

A taxpayer, after being allowed a deduction in a prior year for a loss on the sale of stock, learned in a later year that he could recover his loss from the person who had sold the stock to him because of some representation made at that time. He then reacquired the stock in anticipation of the settlement. But before the settlement was actually entered into, he sold the stock and the cause of action to a newly organized, wholly owned corporation. The sale was on the installment basis. He then made the settlement on behalf of the corporation. Held, the gain from the settlement in its entirety at the time of the settlement was not income to the petitioner. His gain was from the sale to the corporation and was correctly reported by him on the installment basis. Held, further, no part of the deficiency was due to fraud with intent to evade tax.

Herman A. Fischer, Esq., for the petitioner.

C. H. Curl, Esq., for the respondent.

The Commissioner determined a deficiency of $40,913.31 in the petitioner's income tax for 1933, and also determined that an additional 50 per cent of the deficiency was due under section 293 (b) of the Revenue Act of 1932. The issues for decision by the Board are (1) whether the petitioner should have reported the profit from the sale of 5,000 shares of stock of the Oakridge Cemetery Corporation, and (2) whether or not any part of the deficiency is due to fraud with intent to evade tax.

FINDINGS OF FACT.

The petitioner is an individual who filed his income tax return for the calendar year 1933 with the collector of internal revenue for the first district of Illinois.

He purchased 5,000 shares of the capital stock of the Oakridge Cemetery Corporation in 1926 from or through Robert D. Lay at a cost of $100,000. The petitioner sold the 5,000 shares of stock on October 30, 1931, to the John Griffiths Investment Trust for $7,500. He repurchased
20 the stock from the John Griffiths Investment Trust on November 16, 1931, for $7,000 and again sold the same

stock to the same trust on December 30, 1931, for $7,000. He reported the sales of the stock on his Federal income tax return for 1931 and claimed a deduction of $92,500 on that return as a loss from the sales. The deduction was allowed and the question of his liability for income tax for that year was closed by an agreement under section 606 of the Revenue Act of 1928.

The petitioner, in the latter part of 1932, received information which led him to believe that Lay had defrauded him in the transaction in 1926 whereby the petition had acquired the 5,000 shares of stock of the Oakridge Cemetery Corporation. He consulted Harry Markheim, an attorney, who made an investigation, and attempted to negotiate a settlement. Markheim became convinced, and so informed the petitioner on or before January 9, 1933, that a settlement would be made. Markheim informed the petitioner that in the proposed settlement the stock would be resold to Lay and a release of the cause of action would also be given to Lay, and that for this purpose the ownership of the stock should be again placed in the petitioner so that he would have both the ownership of the stock and the cause of action against Lay. The petitioner then purchased the stock from John Griffiths Investment Trust for $8,000. He made payment to the trust on January 10, 1933, by his personal check for $8,000 and received a certificate for the 5,000 shares of stock of the Oakridge Cemetery Corporation, which certificate was endorsed in blank.

Markheim at the same time told the petitioner that he might effect a postponement of the time of payment of income taxes on the profit which would result from the settlement and return of the stock to Lay, and he might also limit the amount of the tax, if he would organize an investment company to which he would sell the stock and cause of action on an installment basis, permitting the investment company to make the settlement with Lay. Markheim told the petitioner that he had organized such a corporation for a client under somewhat similar circumstances and the Bureau of Internal Revenue had made no objection to the method used of reporting the income in that case. The petitioner, prior to 1933, had had some thoughts relating to the formation of an investment corporation or association similar to that known as the John Griffiths Investment Trust. He instructed Markheim on January 9, 1933, to form an investment corporation as Markheim had suggested.

G. W. G. Corporation was organized on January 10, 1933, under the laws of Delaware through the instrumentality of

the Corporation Trust Co., with three of Markheim's
21 associates as directors. The petitioner on that same day paid $1,000 for all of its capital stock and he has ever since held all of that stock. The directors of the corporation on January 10, 1933, approved a proposition made by the petitioner, and to carry out their agreement the following document was executed:

This Memorandum of Agreement, Made this tenth day of January, 1933, between George W. Griffiths, of Chicago, Illinois, and G. W. G. Corporation, a Delaware corporation. Witnesseth:

First: Said George W. Griffiths hereby sells to said G. W. G. Corporation Five Thousand (5,000) shares of the capital stock of Oakridge Cemetery Corporation, an Illinois corporation, and assigns to said corporation any rights said George W. Griffiths may have against Robert D. Lay to require said Robert D. Lay to purchase said stock, and said G. W. G. Corporation hereby purchases said Five Thousand (5,000) shares of the capital stock of said Oakridge Cemetery Corporation, and hereby agrees to pay therefor the sum of Eighty-five Thousand Dollars ($85,000.00), and to assume and perform the obligations of said George W. Griffiths to E. H. Harrison to pay said E. H. Harrison Fifteen Per cent (15%) of the amount of money (after the payment of all expenses) received on the sale of said stock to said Robert D. Lay, and in consummation of said sale said George W. Griffiths has, concurrent with the execution hereof, delivered to said corporation, receipt whereof by said corporation is hereby acknowledged, Certificate No. 1003, evidencing Five Thousand (5,000) shares of said stock, standing in the name of John Griffiths Investment Trust, and endorsed by the Trustees of said John Griffiths Investment Trust in blank.

Second: Said G. W. G. Corporation agrees to pay said sum of Eighty-five Thousand Dollars ($85,000.00) as follows: The sum of One Thousand Dollars ($1,000.00) concurrently with the execution hereof, receipt whereof is hereby acknowledged; the sum of Eleven Hundred Twenty-five Dollars ($1125.00) on January 15, 1933; and the sum of Twenty-one Hundred Twenty-five Dollars ($2125.00) on the fifteenth day of January of each year thereafter, until said entire sum of Eighty-five Thousand Dollars ($85,000.00) is paid.

Said G. W. G. Corporation further agrees to pay interest on said deferred installments at the rate of Three Per Cent (3%) per annum from the date hereof, payable semi-annually on the fifteenth day of January and the fifteenth

day of July in each year on the full amount of the unpaid deferred installments.

In Witness Whereof, the parties have executed this memorandum the day and year first above written.

(Signed) G. W. Griffiths (Seal)
G. W. G. Corporation,
By Stephen J. Allie,
Its President.

(Here are attached $25 of United States documentary stamps, each with the date January 10, 1933, written thereon.)

The directors of the G. W. G. Corporation, on January 11, 1933, authorized the sale of the Oakridge Cemetery Corporation stock to Lay for $100,000, and authorized the petitioner "either in his own name or in the name of the corporation" to do whatever might be necessary or desirable to consummate the sale. The Board also authorized
22 the petitioner as treasurer to invest the proceeds of the sale in a manner consistent with the corporate purposes as stated in the charter.

The settlement with Lay was made on January 11, 1933. The petitioner signed and acknowledged an instrument dated January 11, 1933, which recited that, in consideration of the sum of $180,000 paid to him by Lay, he sold and transferred to Lay:

* * * the following stock certificates and promissory notes duly endorsed, and all my right, title and interest in and to the same:

Certificate No. 22 for Two hundred fifty (250) shares of the common stock of Oakridge Abbey, issued to George W. Griffiths, and endorsed in blank.

Certificate No. 1003 for 5,000 shares of the common stock of Oakridge Cemetery Corporation issued to John Griffiths Investment Trust, and endorsed in blank.

Promissory note of Oakridge Cemetery Corporation for Fourteen thousand dollars ($14,000), dated February 11, 1929, payable on demand and made payable to George W. Griffiths.

Promissory note of Oakridge Cemetery Corporation for Fourteen hundred dollars ($1400), dated August 10, 1932, due on demand and made payable to George W. Griffiths.

The instrument contained a further assignment of another certificate for 4,250 shares of stock of the Oakridge Cemetery Corporation held by a bank as security for bonds. The instrument further recited that, as part consideration for the payment of $180,000, Griffiths, for himself, his heirs,

administrators, and assigns, released and discharged Lay from all actions, causes of action, suits, claims, and demands which Griffiths or his assigns might ever have against Lay.

Markheim received from Lay two checks payable to the petitioner. One was for $80,000, and had to do with the securities mentioned in the agreement other than the stock here in question. The other, for $100,000, was endorsed by the petitioner and deposited on January 12, 1933, in the bank account of the G. W. G. Corporation. The board of directors of the G. W. G. Corporation on January 18, 1933, approved a report made by the petitioner as its treasurer, showing the sale of the stock to Lay for $100,000. The minutes of that meeting stated that the sale had been made pursuant to authority vested in him by the board and he had executed the transaction in his own name. The board also approved the payment of $14,566.08 representing expenses incurred in connection with the sale.

The payments of $1,000 and of $1,125, which the petitioner was to receive from the corporation in January, 1933, were received by him in March, 1933. The corporation paid him $1,243.13 in December, 1933 on account of interest on the unpaid portion of the purchase price.

The G. W. G. Corporation was licensed to do business in the State of Illinois on February 11, 1938, pursuant to advice from Markheim that, although a license was not necessary for an isolated transaction, the license would be required if the corporation were to continue business in Illinois. The G. W. G. Corporation in 1933 invested in various stocks other than the stock of the Oakridge Cemetery Corporation.

The petitioner, in his income tax return for the year 1933, reported $1,875 under "Other Income, Installment Sale (Exhibit F)." Exhibit F on his return as filed was as follows:

Sale of Personal Property on Installment Basis Held Less Than Two Years.

(1) 5,000 shares Oakridge Cemetery Corporation Common Stock purchased at Cost of.....		$8,000.00
(2) Sold on Installment Basis for Gross Price of	$85,000.00	
Less:		
(3) Legal Fees	2,000.00	
(4) Net Selling Price on Installment Basis....		83,000.00
(5) Gross Unrealized Profit.....		$75,000.00
(6) Amount Received in 1933.....		2,125.00
(7) Amount to be Reported in 1933— $\frac{\$75,000.00}{\$85,000.00} \times \$2,125.00$		1,875.00

Other items reported on the return were dividends on stock of domestic corporations, $76,628.92, which included $20,000 received as dividends from the G. W. G. Corporation; salaries and commissions, $14,358.99, which included $10,000 received as salary from the G. W. G. Corporation; and interest, $1,436.15. The record does not show whether or not the interest reported included the interest payment of $1,243.13 received by the petitioner from the G. W. G. Corporation.

The Commissioner, in determining the deficiency, increased the income reported on the return by $73,558.92, representing an understatement of profit from the sale of 5,000 shares of Oakridge Cemetery Corporation stock, with the following explanation:

The alleged assignment of this stock to G. W. G. Corporation (organized on the day of the sale January 10, 1933) has been ignored, and the transaction treated as a sale by you, for your own account.

The Commissioner also made other adjustments which are not in controversy.

OPINION.

MURDOCK: It seems desirable to review briefly some past events before discussing the transactions which give rise directly to the issues in this proceeding. Lay originally prevailed upon the petitioner to purchase the 5,000 shares of Oakridge Cemetery Corporation stock for $100,000. Thereafter, the petitioner sold the stock to the John W. Griffiths Investment Trust and sustained a loss of $92,-
24 500. A deduction of that amount was claimed and allowed on his income tax return for 1931. The petitioner learned late in 1932 that, because of something which Lay had done in the first transaction, a part, or all, of the loss might be recovered from Lay. The petitioner repurchased the stock from the John W. Griffiths Investment Trust in 1933 for $8,000. No question whatsoever is raised as to the propriety for income tax purposes of any of the transactions thus far described. Negotiations for the settlement with Lay had progressed to the point where the parties were all ready to close the transaction. The petitioner was then advised by his attorney of a method whereby he might possibly save himself from the payment of some income taxes. The steps taken to minimize the taxes are the ones and the only ones which give rise directly to the issues in this case.

The following steps were all taken upon the advice of the petitioner's counsel. The G. W. G. Corporation was formed. The process of incorporation began on the 9th of January and was completed early on the 10th. Resolutions theretofore prepared in blank were adopted by the corporation. These authorized the corporation to purchase from the petitioner the stock and the right of action. A contract of sale was executed whereby the G. W. G. Corporation became the legal owner of the stock and the right of action against Lay. The petitioner was authorized to make the settlement with Lay in his own name on behalf of the corporation. The settlement with Lay was completed on January 11 by the petitioner in his own name. The record does not show that Lay or his attorneys were advised of the sale to the corporation. The petitioner deposited to the account of the G. W. G. Corporation the $100,000 which he received from Lay.

The petitioner contends that in the settlement with Lay and in depositing the $100,000, he acted as agent for the G. W. G. Corporation, his undisclosed principal. The Commissioner has ignored the G. W. G. Corporation and has

treated the transaction as if the petitioner had never sold the stock to the corporation, but had acted entirely for himself throughout the settlement with Lay. Counsel for the respondent contends before the Board that the G. W. G. Corporation should be ignored. His contention is not supported by any showing that the sale from the petitioner to the G. W. G. Corporation did not take place or that it was in any respect illegal. He makes no showing that the petitioner acted for himself rather than as agent for the G. W. G. Corporation in concluding the settlement with Lay. He contends that the "mission" of the G. W. G. Corporation was "sinful" and that its intervention was a "nefarious tax evasion scheme", but such statements do not help to decide the case. He relies upon the case of *Gregory* v. *Helvering*, 293 U. S. 465, and upon the case of *Bus & Transport Securities Corporation* v. *Helvering*, 296 U. S. 391. Those cases dealt with the reorganization provisions of the statute and are not in point here, where the petitioner seeks to apply none of those provisions.

This is another case involving a wholly owned corporation. It requires careful scrutiny to see if there is any sufficient reason to disregard the corporate entity, which normally under the law must be recognized as a separate taxpayer from the petitioner. It is not fatal in such cases that the corporation was used deliberately to minimize income taxes. Here one taxpayer, the petitioner, made an actual bona fide sale to another. His income tax liability arises under that transaction rather than as a result of the settlement with Lay. This new corporation continued to exist, as indeed was necessary in order to carry out the installment sale contract. It paid a salary and dividends to the petitioner, which he reported in his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. The steps taken and the reality of the corporation can not be disregarded. Cf. *Chisholm* v. *Commissioner*, 79 Fed. (2d) 14, reversing 29 B. T. A. 1334; *Grand Rapids Trust Co. et al., Administrators*, 34 B. T. A. 170; *Seymour H. Knox*, 33 B. T. A. 972; *Marjory Taylor Hardwick*, 33 B. T. A. 249; *Edwards Securities Corporation*, 30 B. T. A. 918; affd., 83 Fed. (2d) 1007; *James E. Wells*, 29 B. T. A. 222; *David Stewart*, 17 B. T. A. 604; *Rands, Inc.*, 34 B. T. A. 1094; *Ralph Hochstetter*, 34 B. T. A. 791; *William H. Albers*, 33 B. T. A. 373; *A. S. Eldridge*, 30 B. T. A. 1322; affd.,

79 Fed. (2d) 629; *Jones* v. *Helvering*, 71 Fed. (2d) 214; *Commissioner* v. *McCreery*, 83 Fed. (2d) 817.

This petitioner had sold and transferred his stock and the claim against Lay before the settlement with Lay had reached the stage where it had any income tax significance. That the taxpayer, the G. W. G. Corporation, became entitled to the $100,000 paid by Lay as a settlement. The petitioner was not entitled to the $100,000 and the gain from the transaction can not be taxed to him. He correctly reported on the installment basis his gain for 1933 from the sale to the corporation.

The respondent, to sustain his burden of proof on the fraud issue in this case, relies entirely upon the circumstances of the transaction already discussed. He claims that the use of the corporation is evidence that a part of the deficiency is due to fraud with intent to evade tax. Since the additional income was not properly included by the Commissioner it follows that no fraudulent intent can be drawn from the use of the G. W. G. Corporation.

26 But even if the petitioner were to lose on the income issue, nevertheless he would still win on the fraud issue because the record fails to indicate any fraudulent intent on his part. He made no effort to conceal the true facts and circumstances from the Commissioner. He acted upon the advice of counsel and, apparently, in the honest belief that it was proper under the revenue act. The Commissioner must make a stronger showing than he has done in this case to support the charge of fraud.

Reviewed by the Board.

Decision will be entered under Rule 50.

MELLOTT, dissenting: The opinion of the majority holds that on January 10, 1933, there was a sale of the securities by the trust to the petitioner for $8,000, an immediate sale on the installment plan of the same securities by the petitioner to his newly created corporation for $100,000, followed by a sale by the corporation, as an undisclosed principal through petitioner as its agent, to Lay for $100,000. I can not accept this view.

A substantial portion of the sum paid by Lay was paid because of petitioner's claim against him for fraud. In this connection the testimony of the lawyer who handled the transaction for the petitioner is illuminating. He said:

> I told Mr. Griffiths that our right against Lay consisted of a cause of action involving a breach of trust in the general nature of a tort claim, and that in order to effect the settlement it would be necessary to unite the ownership of the stock and the tort claim, or claim

for breach of trust, in the same person. I therefore told him it would be essential for him to reacquire the stock that had been sold to the John Griffiths Investment Trust, and he said he would.

The petitioner testified to the same effect. He stated that the attorney told him "that in order to clean it up I should buy the stock back from the Investment Trust because of my right of action against Lay, and I believe Lay's attorney wanted it that way because the Investment Trust only had the stock and I had the right of action."

While petitioner assigned to the corporation any rights which he might have against Lay to require him "to purchase said stock" it is significant that no attempt was made to assign to the corporation his "cause of action involving a breach of trust in the nature of a tort claim, or claim for breach of trust." Perhaps such claim was not assignable under the laws of Illinois. Cf. *Babcock* v. *Farwell*, 146 Ill. App. 307; affd., 245 Ill. 14; 91 N. E. 683; *North Chicago St. Ry. Co.* v. *Ackley*, 171 Ill. 100; 49 N. E. 222. But even if it were assignable it is significant that Lay was not ad-
27 vised that any assignment had been made and the release was executed by petitioner personally rather than on behalf of the corporation. The release recited that:

> • • • as part consideration for the payment to the undersigned by the said Robert D. Lay of the said sum of One hundred eighty thousand dollars ($180,000) I, the undersigned George W. Griffiths, for myself, my heirs, administrators and assigns, do hereby release and forever discharge the said Robert D. Lay, his heirs, executors, administrators, and assigns, from all actions, causes of action, contracts, debts, liabilities, obligations, suits, claims and demands whatsoever which I, the undersigned ever had, now have, or which I, my heirs, executors, administrators or assigns or any of them, hereafter can, shall or may have for or by reason of any act of omission, cause, matter or thing whatsoever, from the beginning of the World to the date hereof.

The conclusion is inescapable that the major portion of the consideration paid by Lay was for the settlement of the tort action. Under the circumstances I am of the opinion that it constituted income to petitioner. The corporation set up by him was devised merely for the purpose of preventing the amount "paid from vesting even for a second in the man who" was entitled to receive it and the whole transaction is simply an attempt to attribute the fruits "to

a different tree from that on which they grew." *Lucas* v. *Earl*, 281 U. S. 111.

In addition, I am of the opinion that the principle recognized and applied by the court and the Board in connection with the sale of property by the S. A. MacQueen Co. is clearly applicable. See *S. A. MacQueen Co.*, 26 B. T. A. 1337, affd., 67 Fed. (2d) 857. In that case the corporate owner of real estate had entered into an agreement to convey it to a purchaser for $150,000. The three stockholders of the corporation authorized the conveyance of the property to its president for a lesser sum and he executed a declaration of trust declaring his intention to distribute the profits to the stockholders in proportion to their holdings. The trust was carried out and the profit, being the difference between the sum paid by the president to the corporation and the sum received by him from the sale of the property, was distributed to the stockholders. It was held that substance and not form should control; that although in form there were two sales of the corporate real estate, in substance the transaction was a sale by the corporation through the agency of its president; that the obvious purpose of the procedure was to avoid the payment of tax and, under the facts, that the profit should be taxed to the petitioner.

Under the facts before us, I think finding should be made that although in form there was a sale by the corporation to Lay, in substance the transaction was a sale by the petitioner, through the agency of the corporation, of securities owned by him, contemporaneous with the settlement by him of his tort action against Lay. "A given result at the end of a straight path is not made a different result because reached by following a devious path." *Minnesota Tea Co.* v. *Helvering*, ... U. S. ..... (Jan. 17, 1938). Cf. *Snowberg* v. *Commissioner*, 77 Fed. (2d) 446; certiorari denied, 296 U. S. 586.

ARUNDELL, SMITH, TURNER, ARNOLD, and HARRON agree with this dissent.

29 UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82624) • •

DECISION.

Pursuant to the Board's Findings of Fact and Opinion, promulgated February 9, 1938, the respondent herein hav-

petitioner having on March 16, 1938, filed an acquiescence in said recomputation, now, therefore, it is

Ordered and Decided That there is a deficiency in income tax of $4,668.98 for the year 1933.

Entered March 21, 1938.

(s) J. E. Murdock,
Member.

(Seal)

37 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
George W. Griffiths,
Respondent.

B. T. A. Docket No. 82624.

NOTICE OF FILING PETITION FOR REVIEW.

Filed Jun. 21, 1938.

To: George W. Griffiths, 228 North LaSalle Street, Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 15th day of June, 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 15th day of June, 1938.

(Signed) J. P. Wenchel, RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 17 day of June, 1938.

(s) Geo. W. Griffiths,
Respondent on Review.

38 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
• • (Caption—BTA-82624) • •

NOTICE OF FILING PETITION FOR REVIEW.

Filed Jun. 21, 1938.

To: Herman A. Fischer, Esq., Room 2500—1 North LaSalle Street, Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 15th day of June, 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 15th day of June, 1938.

(Signed) J. P. Wenchel, RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 11 day of June, 1938.

(s) Herman A. Fischer,
Attorney for Respondent on Review.

Filed Jun. 15, 1938. 30 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
• • (Caption—BTA-82624) • •

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

Filed Jun. 15, 1938.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau

of Internal Revenue and Charles J. Reilly, Special Attorney, Bureau of Internal Revenue and respectfully shows:

I.

Jurisdiction.

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is and was during the calendar year 1933 an individual resident of and an inhabitant within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit, and filed his income tax return for the year 1933 in the office of the Collector of Internal Revenue at Chicago, Illinois, which office is within the judicial circuit of the United States Circuit Court of Appeals for the Seventh Circuit.

31 II.

Nature of Controversy.

During 1926 the taxpayer purchased from or through Robert D. Lay 5,000 shares of stock of the Oakridge Cemetery Corporation at a cost of $100,000.00. During 1930 the taxpayer sold, repurchased and then sold again these shares of stock to John Griffiths Investment Trust for $7,500.00 and was allowed a loss on said sale of $92,500.00 in income tax return filed for that year.

In 1932 the taxpayer repurchased the stock from the John Griffths Investment Corporation for $8,000.00. On January 10, 1933, the G. W. G. Corporation was organized under the laws of Delaware and taxpayer purchased all the capital stock of the newly organized company for $1,000.00. On the same date an agreement was entered into between the taxpayer and the new corporation whereby the taxpayer agreed to sell to the G. W. G. Corporation for $85,000.00 the 5,000 shares of stock of the Oakridge Cemetery Corporation. On January 11, 1933 the directors of the G. W. G. Corporation authorized the sale of the Oakridge Cemetery Corporation stock to Robert D. Lay for $100,000.00 and authorized the taxpayer, either in his own name or in the name of the corporation to do whatever might be desirable to consummate the sale. On the same date the taxpayer signed and acknowledged an instrument which provided that in consideration of the sum of $180,000.00 paid to him

by Lay, the taxpayer sold and transferred certain stocks and promissory notes, including the 5,000 shares of Oakridge Cemetery stock above referred to. For this stock a check was received from Lay in the amount of $100,000.00. The check for $100,000.00 was endorsed by the taxpayer and deposited on January 12, 1933 in the bank account of the G. W. G. Corporation. In his income tax return for the year 1933 taxpayer reported the sale of said 5,000 shares as having been made to the G. W. G. Corporation.

32 On November 1, 1935, the Commissioner, pursuant to the provisions of section 272(a) of the Revenue Act of 1932 (47 Stat. 233), as amended by section 501 of the Revenue Act of 1934 (48 Stat. 755), forwarded to the taxpayer, by registered mail, a notice of deficiency, wherein the taxpayer was notified of his, the Commissioner's determination of a deficiency in the taxpayer's income tax liability for the year 1933 in the amount of $40,813.31 and of a penalty of $20,406.66. In the aforesaid notice of deficiency the Commissioner disregarded the transfer of stock by the taxpayer to the G. W. G. Corporation and treated the whole transaction as a sale by the taxpayer to Robert D. Lay. As a result, the Commissioner determined that the taxpayer had understated his profit on the sale of said stock to Lay by $73,558.92. This adjustment is responsible for approximately $36,144.00 of the deficiency in tax asserted in the notice of deficiency. Other adjustments were also made in the notice of deficiency which are not here in controversy.

On January 6, 1936, the taxpayer filed a petition with the United States Board of Tax Appeals for a redetermination of the proposed deficiency in his income tax liability for the year 1933, as shown by the notice of deficiency dated November 1, 1935, as aforesaid, which petition was assigned Docket No. 82624. On March 2, 1936, the Commissioner filed with the Board of Tax Appeals his answer to the petition so filed by the taxpayer. The proceedings came on for hearing before a division of the Board of Tax Appeals, sitting at Chicago, Illinois, on June 24, 1937. The issues involved were (1) whether the petitioner should have reported the profit on the sale to Robert D. Lay of the 5,000 shares of stock of the Oakridge Cemetery Corporation and (2) whether or not any part of the deficiency was due to fraud with intent to evade tax.

33 On February 9, 1938, the Board of Tax Appeals promulgated its opinion in this proceeding, wherein it was held that the gain from the sale of the Oakridge Cemetery Corporation stock was correctly reported by the taxpayer in his return and was further held that no part of the de-

ficiency was due to fraud with intent to evade tax. On March 21, 1938 the Board entered its decision in this proceeding wherein it was ordered and decided that, in accordance with its opinion of February 9, 1938, there is a deficiency in income tax of $4,668.98 for the year 1933.

34

III.

Assignments of Error.

That the said Commissioner, being aggrieved by the opinion and decision of the United States Board of Tax Appeals, desires a review thereof, in accordance with the statutes in such cases made and provided, by the United States Circuit Court of Appeals for the Seventh Circuit in which power of such review is vested, and as reasons for such review he alleges that the Board in rendering its opinion and in entering its decision committed the following errors:

1. The Board erred in finding for petitioner.
2. The Board erred in not finding for the respondent.
3. The Board erred in finding that petitioner, during 1933, made a bona fide sale to G. W. G. Corporation of 5,000 shares of stock of the Oakridge Cemetery Coporation.
4. The Board erred in failing to find that the sale of 5,000 shares of Oakridge Cemetery stock to Robert D. Lay during 1933 was in fact a sale by the petitioner.
5. The Board erred in that its finding of facts and decision are not supported by the evidence.

Wherefore, the Commissioner petitions that the opinion of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit; that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors
35 complained of may be reviewed and corrected by said Court.

(s) James W. Morris,
Assistant Attorney General.
(Signed) J. P. Wenchel, RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
Charles P. Reilly,
Special Attorney, Bureau of Internal Revenue.

36 United States of America,
District of Columbia. } ss.

I, Charles P. Reilly, do solemnly swear that I am a Special Attorney of the Bureau of Internal Revenue and as such duly authorized to verify the foregoing petition for review; that I have read the foregoing petition for review and know the contents thereof; that the statements of facts and allegations therein contained are true to the best of my knowledge and belief. So help me God.

(s) Charles P. Reilly.

Subscribed and sworn to before me this 14th day of June, 1938.

George W. Kilis,
(Seal) *Notary Public.*

My Commission expires Nov. 15, 1942.

87 UNITED STATES BOARD OF TAX APPEALS.

(Caption—82624)

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to September 10, 1938.

(Signed) Charles P. Smith,
Member.

Dated: Washington, D. C.,
Aug. 13, 1938.
jd

Now, Sept. 2, 1938, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

84 IN THE UNITED STATES CIRCUIT COURT OF APPEALS. Filed Aug. 10, 1938.

* * (Caption—82624) * *

PRAECIPE FOR RECORD.

Filed Aug. 10, 1938.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Findings of fact, including copies of all exhibits filed, opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Notice of lodgment of statement of evidence with proof of service of notice of lodgment.
6. Statement of evidence as settled and allowed.

85 7. This praecipe.

(Signed) J. P. Wenchel RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 25 day of July, 1938.

(Signed) Herman A. Fischer,
Attorney for Respondent.

86 UNITED STATES BOARD OF TAX APPEALS.

(Caption—82624)

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 85, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 2nd day of September, 1938.

B. D. Gamble,

(Seal) *Clerk, United States Board of Tax Appeals.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 78, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the fourteenth day of October, 1938, in the following entitled cause:

Commissioner of Internal Revenue,
Petitioner,

vs.

George W. Griffiths,
Respondent,

No. 6752, October Term, 1938, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of May, A. D. 1939.

Frederick G. Campbell,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the fifth day of October, in the year of our Lord one thousand nine hundred and thirty-seven, and of our Independence the one hundred and sixty-second.

Commissioner of Internal Revenue
6752 *vs.*
George W. Griffiths.

Petition for Review of Decision of the United States Board of Tax Appeals.

And, to-wit: On the ninth day of September, 1938, there was filed in the office of the Clerk of this Court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6752. October Term, 1938.

Commissioner of Internal Revenue

vs.

George W. Griffiths.

The Clerk will enter our appearance as counsel for Respondent.

Delbert A. Clithero,
Herman A. Fischer,
Carlton L. Fischer,
1 No. La Salle St.,
Chicago, Illinois.

Endorsed: Filed September 9, 1938. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, and of our Independence the one hundred and sixty-third.

And afterwards, to-wit: On the first day of November, 1938, there was filed in the office of the Clerk of this Court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6752. October Term, 1938.

Commissioner of Internal Revenue

vs.

George W. Griffiths.

The Clerk will enter our appearance as counsel for Petitioner.

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.
Charles H. Curl,
Special Attorney, Bureau of Internal Revenue.

Endorsed: Filed November 1, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the seventh day of November, 1938, there was filed in the office of the Clerk of this Court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6752. October Term, 1938.

Commissioner of Internal Revenue

vs.

George W. Griffiths.

The Clerk will enter our appearance as counsel for Petitioner.

James W. Morris,
Assistant Attorney General.
Sewall Key,
Special Assistant to the Attorney General.

Endorsed: Filed November 7, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the seventh day of February, 1939, the following further proceedings were had and entered of record, to wit:

Tuesday, February 7, 1939.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.

Commissioner of Internal Revenue *vs.* George W. Griffiths.	6752	Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and briefs of counsel and on oral argument by Mr. Ellis N. Slack, counsel for petitioner, and by Mr. Herman A. Fischer, counsel for respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-fifth day of February, 1939, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6752. OCTOBER TERM, 1938, JANUARY SESSION, 1939.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*
vs.
GEORGE W. GRIFFITHS, *Respondent.*
} Petition for Review of Decision of the United States Board of Tax Appeals.

February 25, 1939.

Before SPARKS, MAJOR and TREANOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is a petition for review of a decision of the United States Board of Tax Appeals, entered March 21, 1938, denying a deficiency of $40,913.31 as determined by the Commissioner in respondent's income tax for 1933.

The facts, as found by the Board, and not in dispute, are as follows: In 1926, respondent purchased from or through Robert D. Lay at a cost of $100,000, 5,000 shares of the capital stock of the Oakridge Cemetery Corporation. October 30, 1931, the same shares of stock were sold to the John Griffiths Investment Trust for $7,500. November 16, 1931, the stock was repurchased from said investment trust for $7,000, and again sold to the same trust on December 30, 1931 for $7,000. For the year 1931, respondent, in his income tax return, claimed and was allowed a deduction of $92,500 as a loss from these transactions.

Respondent, about January 1, 1933, discovered that Lay had defrauded him in the transaction in 1926, wherein the shares of stock in question were purchased. He consulted and employed Harry Markheim, an attorney, who investi-

gated and commenced negotiations to effect a settlement. On January 9, 1933, respondent was advised by his counsel that Lay would probably make a settlement in the next two or three days. At that time he was also informed that his claim against Lay consisted of a cause of action involving a breach of trust in the nature of a tort claim and that it would be essential for him to reacquire the stock in order to unite the ownership of the stock with the claim. During this same conversation, respondent was advised by his counsel that he might effect a postponement of the time of paying, as well as limit the amount of income taxes on the profit which would result from a settlement and return of the stock to Lay by organizing an investment company to which he would sell the stock and cause of action on an installment basis, permitting the investment corporation to make the settlement with Lay. Respondent had theretofore given thought to the formation of such an investment corporation and on January 9, 1933, instructed his counsel to organize the same.

As a result, arrangements were made by telephone through the instrumentality of the Corporation Trust Company for the organization of the G. W. G. Corporation, which was effected, on the following day, under the laws of Delaware, with three of Markheim's associates as directors. Respondent paid $1,000 for all the capital stock of the corporation. A formal meeting was held in Delaware at 9:00 A. M. on the morning of the 10th, and a meeting in the office of Markheim in Chicago at 10:00 the same morning. On the afternoon of that day, Markheim was definitely advised that Lay was going to pay. The directors of the corporation, on January 10th, approved a proposition made by the taxpayer and entered into a written agreement.[1] On this day, also, respondent purchased the stock from the

1. This Memorandum of Agreement, Made this tenth day of January, 1933, between George W. Griffiths, of Chicago, Illinois, and G. W. G. Corporation, a Delaware corporation.

Witnesseth:

First: Said George W. Griffiths hereby sells to said G. W. G. Corporation Five Thousand (5,000) shares of the capital stock of Oakridge Cemetery Corporation, an Illinois corporation, and assigns to said corporation any rights said George W. Griffiths may have against Robert D. Lay to require said Robert D. Lay to purchase said stock, and said G. W. G. Corporation hereby purchases said Five Thousand (5,000) shares of the capital stock of said Oakridge Cemetery Corporation, and hereby agrees to pay therefor the sum of Eighty-five Thousand Dollars ($85,000.00), and to assume and perform the obligations of said George W. Griffiths to E. H. Harrison to pay said E. H. Harrison Fifteen Per Cent (15%) of the amount of money (after the payment of all expenses) received on the sale of said stock to said Robert D. Lay, and in consummation of said sale said George W. Griffiths has, concurrent with the

John Griffiths Investment Trust, paying $8,000 therefor, and received a certificate endorsed in blank.

On January 11, 1933, the directors of the G. W. G. Corporation approved the sale of the corporation stock to Lay for $100,000 and authorized respondent "either in his own name or in the name of the corporation" to do whatever might be necessary or desirable to consummate the sale. Respondent, as treasurer of the corporation, was also authorized to invest the proceeds of the sale in a manner consistent with the corporate purposes as stated in the charter.

There were matters in dispute between respondent and Lay other than the stock in question, which were all included in a settlement made on January 11, 1933. At that time, respondent received the sum of $180,000 from Lay in the form of two checks, one in the sum of $100,000 and the other in the sum of $80,000. The former was in settlement of the claim arising from the sale of the 5,000 shares of stock of Oakridge Cemetery Corporation, and the latter in settlement of claims concerning other stocks and notes not here material. Respondent, at the time of the making of said settlement, signed and acknowledged an instrument which recited that in consideration of the sum of $180,000 paid to him by Lay, he sold and transferred to Lay various certificates of stock and promissory notes, including the stock here involved, and on behalf of himself, his heirs, administrators and assigns, released and discharged Lay from all actions, causes of action, suits, claims and demands which respondent or his assigns might have against Lay. Lay

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execution hereof, delivered to said corporation, receipt whereof by said corporation is hereby acknowledged, Certificate No. 1008, evidencing Five Thousand (5,000) shares of said stock, standing in the name of John Griffiths Investment Trust, and endorsed by the Trustees of said John Griffiths Investment Trust in blank.

Second: Said G. W. G. Corporation agrees to pay said sum of Eighty-five Thousand Dollars ($85,000.00) as follows: The sum of One Thousand Dollars ($1,000.00) concurrently with the execution hereof, receipt whereof is hereby acknowledged; the sum of Eleven Hundred Twenty-five Dollars ($1,125.00) on January 15, 1933; and the sum of Twenty-one Hundred Twenty-five Dollars ($2,125.00) on the fifteenth day of January of each year thereafter, until said entire sum of Eighty-five Thousand Dollars ($85,000.00) is paid.

Said G. W. G. Corporation further agrees to pay interest on said deferred installments at the rate of Three Per Cent (3%) per annum from the date hereof, payable semiannually on the fifteenth day of January and the fifteenth day of July in each year on the full amount of the unpaid deferred installments.

In Witness Whereof, the parties have executed this memorandum the day and year first above written.

(Sgd) G. W. Griffiths (SEAL)

G. W. G. Corporation,

By Stephen J. Allen,

Its President.

had no knowledge concerning the formation of the G. W. G. Corporation or any agreement or transactions between the respondent and such corporation. The $100,000 check received by respondent from Lay was endorsed by respondent, and on January 12, 1933, deposited in the bank to the credit of the G. W. G. Corporation.

January 18, 1933, the directors of the trust approved a report made by respondent as its treasurer, showing the sale of stock to Lay for $100,000. The minutes of that meeting stated that the sale had been made pursuant to authority vested in respondent by the Board and approved the payment of $14,566.08, representing expenses incurred in connection with the sale. In accordance with the terms of the agreement between respondent and the G. W. G. Corporation, respondent received in March, 1933, $1,000 and $1,125, and in December, 1933, received from the Corporation $1,243.13 on account of interest on the unpaid portion of the purchase price. The G. W. G. Corporation was licensed to do busines in Illinois on February 11, 1933, and invested in various stocks other than those here involved.

Respondent, in his income tax return for the year 1933, reported no income on account of the transaction with Lay, but included in his report installment payments and interest which he received from the G. W. G. Corporation.

The position of the Commissioner, as disclosed in his deficiency letter to respondent is:

> "The alleged assignment of this stock" (5000 shares of the stock of Oak Ridge Cemetery Corporation) "to G. W. G. Corporation" * * * "has been ignored and the transaction" (a succeeding sale to Robert D. Lay) "treated as a sale by you for your own account."

It is the theory of respondent, sustained by the Board, (six members dissenting) that by reason of the agreement between respondent and the G. W. G. Corporation, all the claim and interest of the former was transferred to the latter, and inasmuch as they are separate entities for the purposes of taxation, the profit realized from the transaction with Lay was that of the corporation, and, hence, respondent is not chargeable therewith. Notwithstanding the argument by respondent, not disputed by the petitioner, that the sale of the stock to the corporation was free from fraud; that the transaction was in no way concealed and therefore not illegal, we are presented with a situation in which the taxpayer and his counsel intentionally formulated a contrivance for the sole purpose of enabling the taxpayer to avoid the payment of tax. Authorities are called to our attention where such a purpose has been given

judicial sanction. One of the leading cases is that of *Gregory* v. *Helvering*, 293 U. S. 465. There the court, while considering another section of the Revenue Act, used language which we regard as pertinent. The court recognized the rule here contended for by respondent which it stated on page 469:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."

After making this pronouncement, however, the court went on to say:

> "Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created. But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function."

Thus, the court, while recognizing the transaction as within the law, yet in very forcible language, denied the claim advanced by the taxpayer.

It would be difficult to find language more aptly describing the present situation. Here, as there, the sole object was the consummation of a preconceived plan not to organize a corporation for a business purpose, but merely as a step in the contrivance to escape taxation. It performed, as was intended from the beginning, no other function, with the possible exception of the subsequent transaction of some business not inconsistent with the scheme of which it was a part. If speed in perfecting a plan to evade taxation be a commendable attribute, the taxpayer and his counsel would be entitled to great praise. Within 24 hours after respondent had information that his claim against Lay was to be settled for $100,000, the corporation was organized in Delaware, a meeting of the directors held in Chicago, an agreement made between the corporation and respondent by which the money to be received in conform-

ity with the settlement was to be paid to the corporation, and before the setting of the sun on the following day, the money had actually been received by respondent and deposited in the bank to the credit of the corporation, all for the purpose of enabling respondent to escape payment of tax upon the profit thus derived and which otherwise would have belonged to the Government.

It is argued by the respondent that by reason of the agreement between him and the corporation, he was acting merely as agent of the latter in making the settlement with Lay and in receiving the money by reason of the same. This was merely another link in the scheme, the form of which must give way to substance. Rather than designating respondent as the agent of the corporation, it is more apt to designate the corporation as the agent of respondent. It was he who was responsible for its organization, who owned all of its stock and whose directors were office associates of his counsel. He was the guiding and controlling genius, rather than the corporation. Regardless of whether the assignment of the stock to the corporation by respondent be construed as contended for by petitioner, or to the contrary, we think he retained effective control and dominion over the same. Under the circumstances, he, no doubt, could have terminated the plan almost as rapidly as he created it. The transaction was for his benefit and not the corporation. We think there is merit to the contention that the income was actually received by the taxpayer in his individual capacity, but if not, it was merely diverted into his corporate pocket, of which he was sole proprietor, and syphoned on the installment basis into his individual pocket. The substance of the transaction rather than the form is controlling.[2]

In *Corliss* v. *Bowers*, 281 U S. 376, the taxpayer created a trust, the income from which was to be paid to his wife for life, the remainder over to their children. By the instrument creating the trust, he reserved power "to modify or alter in any manner, or revoke in whole or in part," the trust agreement. He thereby sought to escape tax liability. The holding was against the position of the taxpayer, and the court on page 378 said:

> "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

---

2 *United States* v. *Phellis*, 257 U. S. 156.
Lee v. *Commissioner of Internal Revenue*, 96 F. (2d) 55.
Helvering v. *Gordon*, 87 F. (2d) 663.

In *Lucas* v. *Earl*, 281 U. S. 111, the court, in discussing a situation wherein the taxpayer had sought to escape liability, on page 114 said:

> "But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

In the recent case of *Groves* v. *Commissioner*, 99 F. (2d) 179, the court in considering a question wherein a scheme was devised to evade taxes, on page 183 said:

> "The fact that petitioner organized the two corporations, owned and controlled entirely by him, in anticipation of diverting to them the income he knew he would earn, instead of receiving these earnings himself, cannot avail him to escape a proper tax. A taxpayer cannot enter into a contract under which he assigns to another income to be earned and thereby shift the tax on that income from himself. Here the assignment was made to a corporation the petitioner himself controlled."

The court in *Chisholm* v. *Commissioner*, 79 F. (2d) 14, relied upon by the Board and stressed by respondent, held that the mere purpose to avoid tax by a transfer of property by individuals to a partnership, does not, in itself, vitiate the transaction for tax purposes. The court, however, found that the purpose was to form an enduring partnership to invest and reinvest on a rather extensive scale. It was held that the decision turned on the question whether there was a genuine partnership, or a mere mask for an individual transaction, and concluded it was the former.

In the instant case, it is our view that what was done, including the corporate organization, was a mere mask to cover the real transaction. We therefor conclude the Commissioner correctly treated the transactions as made on respondent's own account. The decision of the Board

of Tax Appeals is reversed with directions to determine the deficiency in conformity with such conclusion.

Endorsed: Filed February 25, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fifth day of February, 1939, the following further proceedings were had and entered of record, to-wit:

Saturday, February 25, 1939.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.

Commissioner of Internal Revenue *vs.* George W. Griffiths.	6752	Petition for Review of Decision of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is ordered and adjudged by this Court that the Decision of the United States Board of Tax Appeals entered in this cause on March 21, 1938, be, and the same is hereby reversed: And that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals with directions to determine the deficiency in conformity with the Opinion of this Court.

And afterwards, to-wit: On the fifteenth day of March, 1939, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition for Rehearing is not copied here.

And afterwards, to-wit: On the fifteenth day of April, 1939, the following further proceedings were had and entered of record, to-wit:

Saturday, April 15, 1939.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.

Commissioner of Internal Revenue *vs.* George W. Griffiths.	6752	Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 81 to 92, inclusive, contain a true copy of the proceedings had and papers filed, excepting briefs of counsel and Petition for Rehearing, in the following entitled cause:

Commissioner of Internal Revenue,
Petitioner,

vs.

George W. Griffiths,
Respondent,

No. 6752, October Term, 1938, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of May, A. D. 1939.

Frederick G. Campbell,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

FILE COPY

Supreme Court, U. S.
FILED
MAY 10 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1938

No. 952 49.

GEORGE W. GRIFFITHS
(Petitioner) Appellee,

vs.

COMMISSIONER OF INTERNAL REVENUE
(Respondent) Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DELBERT A. CLITHERO,
Attorney for Petitioner.

HERMAN A. FISCHER,
CARLTON L. FISCHER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1938

No.

GEORGE W. GRIFFITHS

(*Petitioner*) *Appellee,*

vs.

COMMISSIONER OF INTERNAL REVENUE

(*Respondent*) *Appellant.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, appellee below, prays that a writ of certiorari issue to review the final order entered February 25, 1939 (rehearing denied April 15, 1939) by the United States Circuit Court of Appeals for the Seventh Circuit (Judges Sparks, Major, and Treanor) reversing a decision of the United States Board of Tax Appeals which had been promulgated on February 9, 1938.

(1) Summary Statement of the Matter Involved.

Petitioner commenced this case by filing a petition with the United States Board of Tax Appeals seeking the review of a proposed deficiency of $61,219.97 in the petitioner's individual income tax for the year 1933. The only contested issue arises from the proposed inclusion, as the petitioner's individual income, of $73,558.93 profits realized by G. W. G. Corporation, a company wholly owned by the taxpayer, from the sale of 5000 shares of stock in Oakridge Cemetery Corporation.

In the year 1926 the petitioner had purchased these 5000 shares of stock from or through one Lay at a cost of $100,000. In 1931 he had claimed and been allowed a deduction of $92,500 as a loss realized from its sale to John Griffiths Investment Trust for $7,500.00.

In the latter part of 1932, petitioner acquired information that fraud had been practiced upon him in 1926 when he purchased this stock. One Markheim, petitioner's attorney, undertook investigation and negotiation, and later reported that a settlement was in prospect which would include the resale of this stock to Lay and a release of petitioner's cause of action for fraud. On his advice petitioner repurchased the stock from the trust for $8,000 so that ownership was combined in him of stock and of claim for fraud.

Markheim at the same time told petitioner that he might postpone the payment of income taxes, on the profit from the settlement, and limit their amount, if an investment company should be organized to which petitioner would sell the stock and the cause of action on an installment basis, which company would make the settlement and then use

the proceeds in its business. The petitioner had already considered forming an investment corporation or association; and he then instructed Markheim to proceed.

G. W. G. Corporation was organized on January 10, 1933, petitioner being its sole stockholder. Immediately following its organization, its Directors approved an agreement by which petitioner sold to it the 5000 shares of stock and assigned to it such rights as he might have to require Lay to repurchase the stock; and G. W. G. Corporation agreed to pay petitioner therefor the sum of $85,000. Payment was to be made, $1,000 down, $1,125 five days later, and $2,125 on the fifteenth day of January of each year thereafter, deferred installments bearing 3% interest.

Markheim finished his negotiations; and on the following day a settlement contract was completed and executed. Thereupon, Markheim received from Lay two checks, one for $80,000 (arising from other matters), and one for $100,000. The latter check was endorsed by petitioner to G. W. G. Corporation; and the next day it was deposited in an account which that company had opened two days before in National Builders Bank of Chicago.

G. W. G. Corporation proceeded to obtain a license to transact business in the State of Illinois. During the remainder of the year 1933 it made investments in various securities in amounts totaling over $175,000. The record (Rec. 59) gives the different items purchased, and the dates and proceeds of the sales of such thereof as had since been sold; and it shows (Rec. 57) the first page of the corporation's bank deposit book reflecting cash receipts during the first four years.

In his 1933 income tax return petitioner reported this stock transaction as a sale on an installment basis, returning $1,875 (of the $2,125 collected on principal in that year) as profit realized, and $75,000 as profit as yet unrealized.

Petitioner also returned $20,000 received as dividends from G. W. G. Corporation, $10,000 received as salary as its Treasurer, and interest received as $1,436.15. The latter item presumably included $1,243.13 of interest on the deferred payments, received from G. W. G. Corporation in December 1933.

The Commissioner would treat the sale to Lay as by petitioner individually, at the same time including, in petitioner's income, these items of receipt from the corporation. The Commissioner stated his reason for the increase in income as follows:

> "The alleged assignment of this stock to G. W. G. Corporation (organized on the day of the sale, January 10, 1933) has been ignored, and the transaction treated as a sale by you, for your own account" (Rec. 7).

The United States Board of Tax Appeals, in its opinion promulgated on February 9, 1938 (six members dissenting), made the following statement:

> "It requires careful scrutiny to see if there is any sufficient reason to disregard the corporate entity, which normally under the law must be recognized as a separate taxpaper from the petitioner. It is not fatal in such cases that the corporation shall use means deliberately to minimize income tax. Here one taxpayer, the petitioner, made an actual bona fide sale to another. His income tax liability arises under that transaction rather than as a result of the settlement with Lay. This new corporation continued to exist, as indeed was necessary in order to carry the installment sale contract. It paid a salary and dividends to the petitioner, which he reported in

his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. The steps taken and the reality of the corporation cannot be disregarded" (Rec. 67).

On petition by the Commissioner, the United States Circuit Court of Appeals for the Seventh Circuit reversed the decision of the Board of Tax Appeals, treating the resale to Lay as an individual transaction on the authority of *Gregory* v. *Helvering*, 293 U. S. 465, and saying:

> "Here, as there," (in *Gregory* v. *Helvering*) "the sole object was the consummation of a preconceived plan not to organize a corporation for a business purpose, but merely as a step in the contrivance to escape taxes. It performed, as was intended from the beginning, no other function, *with the possible exception of the subsequent transaction of some business not inconsistent with the scheme of which it was a part.*" (Italics ours.) (Rec. 88.)

(2) Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered February 25, 1939. Petition for rehearing was denied on April 15, 1939, and mandate issued on April 24, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938). The petition is filed in accordance with Rule 38 of this Court. Under Section 8 (a) of the Act of February 13, 1925 (43 Stat. 940) this petition must be filed within three months after the entry of the judgment to be reviewed.

3. Questions Presented.

This cause presents the following questions:

(1) Whether, in determining individual income tax, the legal entity of a corporation may be disregarded, and its transaction treated as that of its stockholder, simply because a tax saving motive attended its organization.

(2) Whether the receipt of funds by a corporation may be treated as constituting income taxable to its sole stockholder, because of his practical control over its affairs.

(3) Whether a Circuit Court of Appeals may substitute its conclusions of fact for those of the United States Board of Tax Appeals; and whether it may at the same time disregard such of the Board's findings of fact as conflict with its own conclusions.

Petitioner suggests that the decision of the Circuit Court of Appeals of the Seventh Circuit, in respect to the first two questions, conflicts with decisions of the Circuit Courts of Appeals of other Circuits, and is based on a misconception of a decision of this Court; also that the third question is a Federal question, in respect to which the Circuit Court's decision is in direct conflict with applicable decisions of this Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has in this case interpreted this Court's decision in the case of Gregory v. Helvering, 293 U. S. 465, as establishing the principle that the existence of a corporation, as an entity separate from its stockholders, may be disregarded merely because a tax-saving motive led to its organization.

The United States Board of Tax Appeals in the instant case (Rec. 67-68) had cited decisions by five Federal Courts of Appeals and eight decisions of the United States Board of Tax Appeals, for the proposition that the separate corporate entity could not be disregarded because of the presence of a tax-saving motive. Its reversal by the Circuit Court of Appeals for the Seventh Circuit discloses a striking conflict between the law as interpreted by that Court of Appeals and the law as interpreted by the Courts of several other Circuits, and that with respect to the important and constantly recurring problems involved in the classification of transactions as corporate or individual.

The effect of such a conflict is illustrated by a comparison of the instant case with the *Chisholm* case (discussed both by the Circuit Court and by the Board in the instant case). On closely parallel facts the Board in that case found for the Commissioner on exactly the theory adopted by the Circuit Court in this case (29 B.T.A. 1334). The Circuit Court of Appeals for the Second Circuit (79 F.C.A. 2d 14) then reversed the Board on the strength of that Court's interpretation of *Gregory* v. *Helvering*. In the instant case the Board accepted that interpretation; and it finds itself again reversed, this time by the Circuit Court of Appeals for the Seventh Circuit.

2. This decision classes the mere receipt of funds by a corporation in a corporate transaction as constituting income to its sole stockholder.

We quote from the Circuit Court's decision in the instant case:

> "Rather than designating respondent as the agent of the corporation, it is more apt to designate the corporation as the agent of respondent. It was he who was responsible for its organization, who owned all of its stock and whose directors were office associates of its counsel. He was the guilding and controlling genius, rather than the corporation." * * * "We think there is merit to the contention that the income was actually received by the taxpayer in his individual capacity, but if not, it was merely diverted into his corporate pocket, of which he was sole proprietor, and syphoned on the installment basis into his individual pocket" (Rec. 89).

The Board has called attention to the fact that the Commissioner's determination in this case involves not only the taxation to an individual of funds when they enter his "corporate pocket," but a second taxation when they pass from that "pocket" to his other pockets.

3. This case involves important questions of the relative jurisdictions, authority, and functions of the United States Board of Tax Appeals and of Circuit Courts of Appeals.

In this case the Circuit Court of Appeals has in effect disregarded findings of fact by the United States Board of Tax Appeals; and in addition it clearly has drawn its own conclusions of fact,—in direct conflict with the conclusions of fact of the United States Board of Tax Appeals.

These considerations are covered more exactly in the brief which follows, but we give here one illustration:

> "In the instant case, it is our view that what was done, including the corporate organization, was a mere mask to cover the real transaction." (From opinion of Circuit Court of Appeals) (Rec. 90).
>
> "The steps taken and the reality of the corporation cannot be disregarded." • • • "This petitioner had sold and transferred his stock and the claim against Lay before the settlement with Lay had reached the stage where it had any income tax significance." • • • "The petitioner was not entitled to the $100,000 and the gain from the transaction cannot be taxed to him." (From opinion of United States Board of Tax Appeals) (Rec. 67-68).

Even more important than the need for uniform criteria to be applied in construing corporate action, is the conflict of judicial views, as to the finality of the findings and conclusions of fact of administrative and quasi-judicial tribunals, to which this decision directs attention. This problem is not confined to the judicial review of the decisions of the Board of Tax Appeals. Its solution should measurably lighten the volume of appeals by eliminating those involving only issues which are not reviewable.

Wherefore your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the decision of the Circuit Court of Appeals for the Seventh Circuit, and that the order of said Court be reversed.

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Attorney for Petitioner.

HERMAN A. FISCHER,
CARLTON L. FISCHER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1938.

GEORGE W. GRIFFITHS,
(Petitioner) Appellee,

VS.

COMMISSIONER OF INTERNAL REVENUE,
(Respondent) Appellant.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

(1) The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit will, it is believed, be reported in 102 Fed. 2nd. The opinion of the United States Board of Tax Appeals is reported in 37 B. T. A. at page 314.

2. Grounds On Which Jurisdiction Is Invoked.

In interest of brevity reference is made to the paragraph entitled "Jurisdiction," in the petition for a writ of certiorari to which this brief is annexed.

(3) Statement of the Case.

A statement of the case will be found under the heading, "Summary Statement of the Matter Involved," in the petition for a writ of certiorari to which this brief is annexed. In the interest of brevity, the statement is not repeated in this brief.

(4) Specification of Errors.

It is submitted that the Circuit Court of Appeals for the Seventh Circuit erred in the following particulars:

(1) In interpreting the decision of *Gregory* v. *Helvering*, 293 U. S. 465, as calling for the disregard of the legal entity of a corporation, as separate from its stockholders, if income tax saving is a leading motive for its incorporation.

(2) In its attempted application of the principles of law announced in *Gregory* v. *Helvering* to a situation presenting issues dissimilar to those there decided, and not of the kind intended to be governed thereby.

(3) In professing to distinguish the decision of *Chisholm* v. *Commissioner*, 79 Fed. 2nd 14 (C. C. A. 2d Cir.) on the facts, when in respect to the facts the cases are exactly parallel.

(4) In treating the receipt of funds by a corporation, in a corporate transaction, as income to its sole stockholder, merely because of his complete control over the corporation.

(5) In assuming facts not supported by, and even in conflict with, the findings of fact of the United States Board of Tax Appeals.

(6) In arriving at a decision based on its own conclusions of fact, which are contrary to the conclusions of the Board and are not sustained by the record.

(7) In reversing the decision of the United States Board of Tax Appeals upon a question of fact.

(8) In failing to affirm the decision of the United States Board of Tax Appeals.

SUMMARY OF ARGUMENT.

1. The legal status of a corporation, as an entity distinct from its controlling stockholder, may not be disregarded merely because a tax saving motive attended its organization.

Gregory v. *Helvering*, 293 U. S. 465.
Smith v. *Higgins, Collector*, 102 Fed. 2nd 456 (C. C. A. 2nd Cir.).
Chisholm v. *Commissioner*, 79 Fed. 2nd 14 (C. C. A. 2nd Cir.), also 29 B. T. A. 1334.

2. The fact that a sole stockholder has practical control over the affairs of a corporation, does not justify treating the receipt of funds by it, in a corporate transaction, as individual income to him.

Burnet v. *Commonwealth Improvement Company*, 287 U. S. 415.
Dalton v. *Bowers*, 287 U. S. 404 (407-8).
Grand Rapids Trust Co. as Administrator, etc. v. *Commissioner*, 34 B. T. A. 170.
Smith v. *Higgins, Collector*, 102 Fed. 2nd 456 (C. C. A. 2nd Cir.), *supra*.

3. As to facts:

a. The findings of fact of United States Board of Tax Appeals, if sustained by substantial evidence, are conclusive upon the United States Circuit Court of Appeals.

Phillips v. *Commissioner*, 283 U. S. 589 (600).
California Barrel Co. v. *Commissioner*, 81 Fed. 2nd 190 (193) (C. C. A. 9th Cir.).

b. The Circuit Court of Appeals has no power to substitute its conclusions of fact for those of the Board of Tax Appeals.

Elmhurst Cemetery Company v. *Commissioner*, 300 U. S. 37 (40).

Helvering v. *Rankin*, 295 U. S. 123 (131).

ARGUMENT.

POINT I.

1. The legal status of a corporation, as an entity distinct from its controlling stockholder, may not be disregarded merely because a tax saving motive attended its organization.

In its opinion, the Circuit Court professes to recognize the principle that a taxpayer may properly consider tax results in determining the form of contemplated transactions; but it nevertheless denies the application of that principle to the instant case. Under Point III we call attention to the unauthorized liberty taken with the facts in attempting to justify this denial; but, passing for the moment factual questions, we here urge that there has been a misapplication of this Court's decision in *Gregory* v. *Helvering*, 293 U. S. 465.

The Circuit Court quotes an extract from that decision as the basis for treating a sale made by the controlled corporation as petitioner's individual transaction. It has been uniformly held that, in the absence of applicable legislation, corporate acts are not those of its stockholders for tax purposes. This is not the first case in which the Commissioner has sought to apply *Gregory* v. *Helvering* as changing this rule; a good judicial reply to such an effort is found in *Smith* v. *Higgins, Collector* (U. S. C. C. A. 2d Cir.), 102 Fed. 2nd 456:

> "Though the case just mentioned" (*Gregory* v. *Helvering*) "is relied on by the government it is not of help to it for it had to do with a pretended reor-

ganization not within the scope of that statute. The present case differs in that it involves a real sale to an actual buyer" (the wholly-owned corporation) (page 458).

In the instant case, the G. W. G. Corporation received and retained the proceeds of the sale of the stock it had acquired from petitioner; and it proceeded to use such proceeds in its business, which business still continued at the time of trial several years later. As stated by the United States Board of Tax Appeals, the Commissioner himself has not been consistent in his disregard of "the separateness of the corporation," and its "reality cannot be disregarded."

In the instant case, the Circuit Court denies that its decision conflicts with that of the Second Circuit in *Chisholm* v. *Commissioner* (79 Fed. 2nd 14), stating that the Court in that case "*found* that the purpose was to form an enduring partnership to invest and reinvest on a rather extensive scale" (Rec. 90).

That, too, was an appeal from the Board of Tax Appeals; and the Circuit Court of the Second Circuit evidently recognized the fact that it had no jurisdiction to find anything. It did, however, have before it a finding by the Board of Tax Appeals that:

> "The petitioners had considered the advisability of forming a partnership several months prior to this time, but had taken no steps to that end. It was formed at this particular time upon advice of their attorney for the purpose of avoiding income tax on the profit on the prospective sale of their Houde Engineering stock" (29 B. T. A. 1337-8).

The initial partnership capital consisted only of the contribution by each of the two partners of his 300 shares

(with a market value of $472,057) which were already under option of sale. The report is not clear as to what the partnership did with the proceeds of the sale of this stock after the option was exercised; but apparently it invested in other securities.

Can that finding and those facts be distinguished in principle from the following findings, which are binding on the Circuit Court in the instant case?—

> "The petitioner, prior to 1933, had had some thoughts relating to the formation of an investment corporation." • • • "He instructed Markheim, on January 9, 1933, to form an investment corporation."
>
> "G. W. G. Corporation was licensed to do business in the State of Illinois on February 11, 1933 pursuant to advice from Markheim that, although a license was not necessary for an isolated transaction, the license would be required if the corporation were to continue business in Illinois. The G. W. G. Corporation, in 1933 invested in various stocks other than the stock of the Oakridge Cemetery Corporation" (Rec. 61 & 64).

The Circuit Court states that the decision in the *Chisholm* case "turned on the question whether there was a genuine partnership or a mere mask for an individual transaction"; and concludes,—without any support either in finding or fact,—with the statement that "G. W. G. Corporation is not a genuine corporation but a mere mask."

Despite the effort in the opinion to reconcile its decision with previously decided cases, the Circuit Court has made a real departure from established principles by holding, in effect, that the tax motive involved is, of itself alone, sufficient ground for ignoring the existence of a separate corporate entity. Actually, the decision is in

square conflict with that of the Second Circuit in the *Chisholm* case, and a serious question is raised as to the effect of this Court's decision in *Gregory* v. *Helvering*.

POINT II.

The fact that a sole stockholder has practical control over the affairs of a corporation, does not justify treating the receipt of funds by it, in a corporate transaction, as individual income to him.

The Circuit Court's reference to petitioner's "corporate pocket" might be passed as a figure of speech. Its application, like the observation that "substance rather than form must control," depends on facts. Had the Court applied this figure consistently, it would have suggested the elimination, from taxpayer's individual income, of $31,436.15 of salary, dividends, and interest received from his corporation; and it would thereby have reduced the amount in controversy by about fifty percent.

The Court rightly states that petitioner was the "guiding and controlling genius," although it is not justified in saying that the transaction "was for his profit and not the corporation's," except in the same sense that every corporation exists for the ultimate benefit of its stockholders. The transaction provided the corporation with funds which it proceeded to use in a series of large and profitable investments (Rec. 59).

In *Dalton* v. *Bowers*, 287 U. S. 404, and *Burnet* v. *Commonwealth Improvement Company*, 287 U. S. 415, the taxpayers had sought to apply the same rule to reversed situations. It chanced to be to their advantage that the profits or losses of solely owned corporations should be treated as realized or sustained by them individually.

This court in those cases held otherwise, as indeed it has uniformly held on similar facts.

On this point we have cited *Grand Rapids Trust Company, as Administrator, etc.* v. *Commissioner*, 34 B. T. A. 170, because in that case the advantage sought, in the questioned transaction, was of exactly the same nature as that in this case. The petitioner's intestate had sold to a corporation, all of whose stock was owned by him and his immediate family, certain securities subject to an existing option for sale. This sale to the corporation was on an installment basis and the individual profits were being reported on an installment basis, despite the fact that the corporation had received cash from the exercise of the option. The Board held that this was proper, saying:

> "The separateness of Smith and the corporation as juristic entities and ~~also as~~ taxpayers cannot be disputed, and there is no evidence which would justify lack of recognition of either" (p. 171).

The latest decision, as to the tax effect of a transaction with an individually owned corporation, is *Smith* v. *Higgins, Collector*, (U. S. C. C. A. 2nd Cir.) 102 Fed. 2d 456, in which the Court said:

> "However closely the plaintiff controlled Innisfail as its sole stockholder, and he was also its president, it is clear that that corporation had for years before this transaction bought, sold and held, and did afterwards buy, sell and hold, large amounts of securities. It had a business existence and was a corporate entity separate and distinct by itself with assets and liabilities of its own apart from those of its sole stockholder. *And the fact that it had but one stockholder did not prevent its having such a separate legal status.*

Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415. * * * As such a corporation, it was in law a legal person whose acts were its own in making the purchase of these securities and when the purchase was made and the shares transferred to it Innisfail was the sole owner of them. * * * The existence of a motive to reduce or avoid taxation by making a valid sale is of no consequence for the plaintiff had the right to give effect to that purpose by whatever lawful means he had available. *Gregory* v. *Helvering*, 293 U. S. 465" (Rec. 457-8).

POINT III.

The Circuit Court's decision is based both on assumptions of fact contrary to the Board's findings, and on the Court's own unfounded conclusions of fact.

Determinations of fact by the United States Board of Tax Appeals are conclusive if sustained by substantial evidence. *Phillips* v. *Commissioner*, 283 U. S. 589 (600). This is true even though the determinations be not stated as formal findings. *California Barrel Co.* v. *Commissioner*, 81 Fed. 2d 190 (193).

The first two paragraphs which follow are from the Board's formal findings in the instant case, the third, which also involves determination of fact, from its opinion:

"The petitioner, prior to 1933, had had some thoughts relating to the formation of an investment corporation or association similar to that known as The John Griffiths Investment Trust." (This Trust is referred to in the record as existing for some years before the questioned transaction.) "He instructed Markheim, on January 9, 1933, to form an investment corporation as Markheim had suggested" (Rec. 61).

"The G. W. G. Corporation in 1933 invested in various stocks other than the stock of the Oakridge Cemetery Corporation" (Rec. 64). (This finding is based on evidence detailing the corporation's investments in the year 1933, from which it appears that, in that year alone, it invested $179,762.50 in securities other than those of the Oakridge Cemetery Corporation. See tabulation at Rec. 59.)

"It" (the corporation) "paid a salary and dividends to the petitioner, which he reported in his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. The steps taken and the reality of the corporation cannot be disregarded" (Rec. 67).

In the following quotation from the Circuit Court's opinion, we italicize statements of fact which, we submit, not only are contrary to the Board's findings, but are without support in the record:

"Here, as there, *the sole object* was the consummation of a preconceived plan *not to organize a corporation for a business purpose*, but merely as a step in the contrivance to escape taxation. *It performed, as was intended from the beginning, no other function, with the possible exception* of the subsequent transaction some business not inconsistent with the scheme of which it was a part" (Rec. 88).

"We are presented with a situation in which the taxpayer and his counsel intentionally *formulated a contrivance for the sole purpose* of enabling the taxpayer to avoid the payment of tax" (Rec. 87).

It cannot help to say that the Circuit Court was merely drawing conclusions. These certainly are not conclusions of law, but at best are on a par with the Court's final conclusion of fact, that:

> "It is our view that what was done, including the corporate organization, was a mere mask to cover the real transactions" (Rec. 90).

In the recent decision of *Elmhurst Cemetery Company* v. *Commissioner*, 300 U. S. 37, this Court thus expressed a ground for reversing a decision by this same Circuit Court:

> "This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board." (Page 40.)

In the earlier case of *Helvering* v. *Rankin*, 295 U. S. 123, this Court said:

> "If the Board has failed to make an essential finding" • • • "the proper procedure is to remand the case for further proceedings before the Board." (p. 131.)

CONCLUSION.

The decision in *Gregory* v. *Helvering* has eliminated a multitude of technical devices which were masquerading under the title of "reorganizations;" but we submit that this great service will be largely offset by the resulting judicial confusion if the case is permitted to become the justification for disregarding corporate existence whenever such disregard produces a result which appeals to the particular Board or Court before which the question arises.

If judicial encroachments on the fact-finding province of quasi-judicial bodies are to be countenanced, their bounds must be defined.

In both respects the case at bar would appear to call for the elimination of the conflict in opinion between Circuit Courts of Appeals, by the final decision of this Honorable Court.

Respectfully submitted,

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HERMAN A. FISCHER,
CARLTON L. FISCHER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 49

GEORGE W. GRIFFITHS,
(Petitioner) Appellee,

vs.

COMMISSIONER OF INTERNAL REVENUE,
(Respondent) Appellant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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Of Counsel.

THE DARNELL-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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No. 49.

GEORGE W. GRIFFITHS,
(Petitioner) Appellee,

vs.

COMMISSIONER OF INTERNAL REVENUE,
(Respondent) Appellant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion below of the United States Circuit Court of Appeals for the Seventh Circuit is officially reported at 103 Fed. (2d) 110; and that of the United States Board of Tax Appeals is officially reported at 37 B. T. A. 314.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The order of reversal was entered by the Circuit Court of Appeals February 25, 1939 (R. 91).

The petitioner's petition for rehearing was denied by the Circuit Court of Appeals April 15, 1939 (R. 92). The petition for certiorari was filed in this Court May 10, 1939 and granted October 13, 1939.

Statement of the Case.

Petitioner commenced this case by filing a petition with the United States Board of Tax Appeals (R. 2 to 8) seeking the review of a proposed deficiency of $61,219.97 in the petitioner's individual income tax for the year 1933. The only contested issue arises from the proposed inclusion, as the petitioner's individual income, of $73,558.93 of profits which the petitioner is charged with having realized, individually, from a sale of 5000 shares of stock in Oakridge Cemetery Corporation, which sale the United States Board of Tax Appeals has found to have been made by G. W. G. Corporation, a Company wholly owned by the petitioner.

In the year 1926 the petitioner had purchased these 5000 shares of stock from or through one Lay at a cost of $100,000. In 1931 he had claimed and been allowed a deduction of $92,500 as a loss realized from the sale of the same shares to John Griffiths Investment Trust for $7,500 (R. 13).

In the latter part of 1932, petitioner acquired information that fraud had been practiced upon him in 1926 when he purchased this stock. One Markheim, petitioner's attorney, undertook investigation and negotiation; and he later reported that a settlement was in prospect which would involve the resale of this stock to Lay and a release of petitioner's cause of action for fraud. On his advice petitioner repurchased the stock from the trust for $8,000, thus combining in himself ownership of the stock and of the claim for fraud (R. 13, 14, 15, 17).

Markheim, at the same time told petitioner that the payment of income taxes on the profit from the settlement might be postponed, and their amount limited, if an investment company should be organized to which petitioner would sell the stock and the cause of action on an installment basis, which company would make the settlement and then use the proceeds in its business (R. 14, 15). The petitioner had already been considering forming an investment corporation or association (R. 14); and he then instructed Markheim to proceed (R. 15).

G. W. G. Corporation was organized on January 10, 1933, petitioner being its sole stockholder. Immediately following its organization, its Directors authorized the execution of an agreement by which petitioner was to sell to it the 5,000 shares of stock and assign to it such rights as he might have to require Lay to repurchase the stock; and G. W. G. Corporation was to pay petitioner therefor the sum of $85,000. Payment was to be made, $1,000 down, $1,125 five days later, and $2,125 on the fifteenth day of January of each year thereafter, deferred installments bearing three per cent (3%) interest. The agreement bears the same date as the meeting (Ex. 2a, R. 48, 50, in evidence R. 14).

Markheim finished his negotiations; and on the following day a settlement contract was completed and executed (R. 15, 18). Thereupon, Markheim received from Lay two checks, one for $80,000 (arising from matters not in question), and one for $100,000. The next day the latter check was deposited to the credit of G. W. G. Corporation, in an account which that Company had opened two days before in National Builders Bank of Chicago (R. 15, and 18, also Exhibit 4, R. 57, in evidence R. 16).

G. W. G. Corporation thereafter proceeded to obtain a license to transact business in the State of Illinois. During

the remainder of the year 1933 it made investments totaling over $175,000 in stocks of National Dairy Products, Union Carbide and Carbon, Eastman Kodak, Youngstown Sheet and Tube, and Chapin & Gore. (See Exhibit 5, R. 59, in evidence R. 16, which shows each investment made in the year 1933, and the dates of sale of such of these items as have been sold.)

In his 1933 individual income tax return petitioner reported this sale to G. W. G. Corporation as a sale on an installment basis, returning $1,875 (of the $2,125 collected on principal in that year) as profit realized, and $75,000 as profit as yet unrealized (Exhibit 2a, R. 22 and 30, in evidence R. 14).

In this 1933 return, petitioner also reported $20,000 of income received as dividends from G. W. G. Corporation, $10,000 received as salary as its Treasurer, and interest received as $1,436.15. The latter item presumably included $1,243.13 of interest, on the deferred payments, received from G. W. G. Corporation in December 1933 (Exhibit 2-a, R. 22, 27 and 29, in evidence R. 14).

In his deficiency letter, the Commissioner, respondent herein, treated the sale to Lay by G. W. G. Corporation as a sale made by petitioner individually, charging him with the entire profit less the above mentioned item of $1,875, but making no allowance or deduction to offset his return of interest, dividends and salary from G. W. G. Corporation. He stated his reason for the increase in income as follows:

> "The alleged assignment of this stock to G. W. G. Corporation (organized on the day of the sale, January 10, 1933) has been ignored, and the transaction treated as a sale by you, for your own account." (R. 7.)

The United States Board of Tax Appeals, in its opinion

romulgated on February 9, 1938 (six members dissent-
ng), made the following statement:

"It requires careful scrutiny to see if there is any sufficient reason to disregard the corporate entity, which normally under the law must be recognized as a separate taxpayer from the petitioner. It is not fatal in such cases that the corporation was used deliberately to minimize income taxes. Here one taxpayer, the petitioner, made an actual bona fide sale to another. His income tax liability arises under that transaction rather than as a result of the settlement with Lay. This new corporation continued to exist, as indeed was necessary in order to carry the installment sale contract. It paid a salary and dividends to the petitioner, which he reported in his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. The steps taken and the reality of the corporation cannot be disregarded." (R. 67.)

On petition by the Commissioner, the United States Cir-
uit Court of Appeals for the Seventh Circuit reversed the
ecision of the Board of Tax Appeals, treating the resale
o Lay as an individual transaction on the authority of
regory v. *Helvering*, 293 U. S. 465, and saying:

"Here, as there," (in *Gregory* v. *Helvering*) "the sole object was the consummation of a preconceived plan not to organize a corporation for a business purpose, but merely as a step in the contrivance to escape taxes. It performed, as was intended from the beginning, no other function, *with the possible exception of the subsequent transaction of some business not inconsistent with the scheme of which it was a part.*" (Italics ours.) (R. 88.)

Specification of Errors.

It is submitted that the Circuit Court of Appeals for the Seventh Circuit erred in the following particulars:

(1) In interpreting the decision of *Gregory* v. *Helvering*, 293 U. S. 465, as calling for the disregard of the legal entity of a corporation, as separate from its stockholders, if income tax saving is a leading motive for its incorporation.

(2) In its attempted application of the principles of law announced in *Gregory* v. *Helvering* to a situation presenting issues dissimilar to those there decided, and not of the kind intended to be governed thereby.

(3) In professing to distinguish the decision of *Chisholm* v. *Commissioner*, 79 Fed. 2nd 14 (C. C. A. 2d Cir.) on the facts, when in respect to the facts the cases are exactly parallel.

(4) In treating the receipt of funds by a corporation, in a corporate transaction, as income to its sole stockholder, merely because of his complete control over the corporation.

(5) In assuming facts not supported by, and even in conflict with, the findings of fact of the United States Board of Tax Appeals.

(6) In arriving at a decision based on its own conclusions of fact, which are contrary to the conclusions of the Board and are not sustained by the record.

(7) In reversing the decision of the United States Board of Tax Appeals upon a question of fact.

(8) In failing to affirm the decision of the United States Board of Tax Appeals.

SUMMARY OF ARGUMENT.

A. Statutes Involved.

(From Revenue Act of 1932.)

SEC. 51. INDIVIDUAL RETURNS.

(a) *Requirement.*—The following individuals (referring to those with incomes above minimum) shall each make under oath a return stating specifically the items of *his gross income* and the deductions and credits allowed under this title— • • •

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this title shall make a return, stating specifically the items of *its gross income* and the deductions and credits allowed by this title. • • •,

SEC. 44. INSTALLMENT BASIS.

• • • • • •

(b) *Sales of Realty and Casual Sales of Personalty.*—In the case of a cash sale or disposition of personal property for a price exceeding $1,000 • • • if in either case the initial payments do not exceed 40 per centum of the selling price, the income may, • • • be returned on the basis and in the manner above provided in this section. • • •

NOTE: Clauses (a) and (c) relate to those regularly selling on the installment basis. Clause (d) provides for an acceleration of the time when the balance of the profit on an installment obligation shall be returned in certain contingencies, such as the sale of the obligation or its transmission at the death of the obligee.

B. Points and Authorities.

1. The transaction in question is a casual sale of personalty on the installment plan; and is reflected in the return in accordance with the statute.

Section 44. Revenue Act of 1932.

2. The existence of a corporation, as a legal entity, may not be disregarded merely because a tax saving motive attended its organization.

Gregory v. *Helvering*, 293 U. S. 465.

Chisholm v. *Commissioner*, 79 Fed. (2d) 14, (C. C. A. 2d Cir.).

Helvering v. *Johnson*, 104 Fed. (2d) 141, (C. C. A. 8th Cir.).

3. The fact that petitioner controlled the corporation, to which the sale was made, does not justify treating the receipt of funds by it, in a corporate transaction, as individual income to him.

Burnet v. *Commonwealth Improvement Company*, 287 U. S. 415 (418-420).

Dalton v. *Bowers*, 287 U. S. 404, (407-8).

Smith v. *Higgins*, 102 Fed. 2d, 456 (C. C. A. 2d Cir.).

Commissioner v. *Eldridge*, 79 Fed. (2d) 629.

Grand Rapids Trust Co. v. *Commissioner*, 34 B. T. A. 170.

4. As to facts:

(a) The findings of fact of United States Board of Tax Appeals, are conclusive upon the United States Circuit Court of Appeals, they being sustained by substantial evidence.

Phillips v. *Commissioner*, 283 U. S. 589 (600).

California Barrel Co. v. *Commissioner*, 81 Fed. 2d 190 (193) (C. C. A. 9th Cir.).

(b) The conclusions of fact drawn by the Circuit Court of Appeals should be disregarded.

Elmhurst Cemetery Company v. *Commissioner*, 300 U. S. 37 (40).

Helvering v. *Rankin*, 295 U. S. 123 (131).

Van's Investment Co. Limited as Commissioner, 92 Fed. (2d) 861 (C. C. A. 9th Cir.).

ARGUMENT.

1. Petitioner's sale to G. W. G. Corporation, of the stock and right to require its purchase, was properly reflected in his income tax return.

If, as we contend, the petitioner's sale to G. W. G. Corporation was genuine (the sale to Lay being made by that corporation) we do not think there will be any question of the correctness of petitioner's return in treating his sale to G. W. G. Corporation as a casual sale on the installment plan. (See Sec. 44 Revenue Act of 1932.)

Obviously, if the sale to Lay should be treated as made by petitioner individually, as is claimed by the respondent, all elements of petitioner's reported profit, derived from G. W. G. Corporation, should have been excluded from his individual income. Respondent did exclude the reported profit in the principal installment received from G. W. G. Corporation in 1933, but he retained, in petitioner's individual income, interest on the deferred installments received in 1933 from G. W G. Corporation as well as dividends and salary paid to petitioner by that company.

As pointed out by the Board of Tax Appeals, respondent occupies the inconsistent position of seeking to add $73,558.92 to petitioner's income, on the theory that the controlled corporation was merely his "corporate pocket" (so termed by the Circuit Court of Appeals), but of retaining, in petitioner's reported individual income, $33,118.13 of the $34,933.13, on the receipt of which, in that same year from this same "corporate pocket," he has already paid income tax.

. The existence of a corporation, as a legal entity, may not be disregarded merely because a tax saving motive attended its organization.

Confessedly, a tax saving motive attended petitioner's organization of G. W. G. Corporation at this particular time. It was not his sole motive, nor were the corporation's activities limited to the transaction here in question.

Respondent would have the corporation's transaction treated as respondent's own on the basis of this Court's statement, in *Gregory* v. *Helvering*, 293 U. S. 465, that what was there claimed to be a "reorganization" was an operation having no business or corporate purpose.

It cannot be denied that G. W. G. Corporation was a real corporation. It made investments, realized profits (and in some cases losses), declared dividends, paid salary (Ex. 5 R. 59, in evidence R. 16).

In *Gregory* v. *Helvering* itself this Court recognized the "legal right of a taxpayer to decrease the amount of what otherwise would have been his taxes, or altogether avoid them by means which the law permits" (p. 469). In a multitude of cases the "means selected" have included the organization of a corporation, association, or partnership; and the saving has been sustained. We mention two from a multitude of such decisions.

We cite *Chisholm* v. *Commissioner* (cited by the Circuit Court of Appeals in the instant case) because of the striking parallel of its facts with those in the instant case and the Court's incisive analysis of the decision in *Gregory* v. *Helvering*.

In the Chisholm case, as in the instant case:

(a) The taxpayers anticipated the sale of a stock which if sold by them as individuals would result in heavy income taxes.

In the Chisholm case they had given a thirty day option, and the optionee had later indicated that the option would be exercised (79 Fed. 2d 14). In the instant case the taxpayer's attorney had expressed the opinion that Lay would repurchase the stock (R. 17).

(b) Each taxpayer had considered the formation of an investment company; whether a partnership, association, or corporation is immaterial (79 C. C. A. 2d 15, and R. 14).

(c) The taxpayers' attorneys had informed them that tax saving, postponement or reduction, might be effected if such an investment concern were then organized, which would acquire the stock from the taxpayers and thereafter sell it (79 C. C. A. 2d 15 and R. 14-15).

The Circuit Court of Appeals said, in the Chisholm case:

> "True, it is always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touchstone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize. In *Gregory* v. *Helvering*, *supra*, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, the incorporators adopted the usual form for creating business corporations; but their intent, or purpose, was merely to draft the papers, in fact not to create corporations as the court understood that word. That was the purpose which defeated their exemption, not the accompanying purpose to escape taxation; that purpose was legally neutral. Had they really meant to conduct a business by means of the two reorganized companies, they would have escaped, whatever other aim they might have had, whether to avoid taxes, or to regenerate the world."

In the case of *Helvering* v. *Johnson*, 104 Fed. 2d 141 (C. C. A. 8th Cir.), also pending in this court on certiorari, the taxpayer had caused a corporation to be organized

whose stock was owned by him and his wife. He sold certain stock to that corporation and claimed a loss on his income tax return.

The Board held that the sale was "an actual bona fide" one, four members of the Board dissenting on the ground that the corporation had not been organized "for the purpose of carrying on a business, and in fact did not carry on a business."

The Circuit Court of Appeals affirmed the Board's decision for the taxpayer, stating "that the respondent and the Investment Company were distinct entities is not questioned" (citing *Burnet* v. *Clark*, 287 U. S. 410; *Burnet* v. *Commonwealth Improvement Company*, 287 U. S. 415; *Klein* v. *Board Supervisor*, 282 U. S. 19, and *Jones* v. *Helvering*, 71 Fed. (2d) 214, 217). "The Corporation has remained in existence. It has retained the Shoe Company stock which it acquired in 1933. The number of stockholders of the Investment Company is unimportant" (citing *Cannon Manufacturing Company* v. *Cudahy*, 267 U. S. 333, and *Burnet* v. *Commonwealth Improvement Company*, *supra*) "except that it shows that the Investment Company was not organized merely for the purpose of enabling the respondent to take a loss and still retain the beneficial ownership of the stock sold. His wife acquired rights as a stockholder in the investment which could not be ignored by him" (*Eisner* v. *Macomber*, 252 U. S. 189). "By the sale of the stock of the Shoe Company to the Investment Company the respondent was divested of all property rights in the stock in return for the proceeds of the sale (Page 143)."

3. The fact that petitioner controlled the corporation, to which the sale was made, does not justify treating the receipt of funds by it, in a corporate transaction, as individual income to him.

Since the decision in *Gregory* v. *Helvering* there have been repeated attempts to apply its statement that "artifice" must not be "exalted above reality," to facts to which this statement has no application except through distortions of the words "artifice" and "reality."

The "reality" in this case is that a corporation, G. W. G. Corporation, acquired certain stock under a valid contract, sold it for a valid consideration, and used the proceeds in its business. Each transaction in which petitioner, its stockholder, might thereafter acquire its funds would have income tax consequences for him, even without regard to the probable previous payment by the corporation of tax on substantially the same funds. In fact, the taxable income which petitioner reported, in 1933 alone, as realized from and through the corporation, exceeded 47½% of the increase in his income proposed by respondent.

Efforts to disregard, for income tax purposes, the existence of a wholly owned corporation as an entity distinct from its controlling stockholder, have been before the courts almost innumerable times. In this Court, at least, the decisions are uniform that the unity of ultimate interest does not justify the amalgamation of the corporation with its stockholder.

In *Dalton* v. *Bowers*, 287 U. S. 404 (407-8), and *Burnet* v. *Commonwealth Improvement Company*, 287 U. S. 415 (418-420), it was the taxpayers who had chanced to find it to their advantage that the profits or losses of solely owned corporation should be treated as sustained by them as individuals. This Court applied the rule to the contrary, the same as it has applied it when the Commissioner

of Internal Revenue has sought to disregard the legal separateness of the corporation.

"The rule is well settled that the corporation will be looked upon as a legal entity." (287 U. S. 408.)

"The fact is that petitioner did have a separate legal existence with privileges and obligations entirely separate from those of its stockholders. *The fact that it had only one stockholder seems of no legal significance.*" (287 U. S. 419.)

In the case of *Smith* v. *Higgins, Collector,* 102 Fed. 2d. 456 (also pending in this Court on certiorari), the Circuit Court of Appeal for the Second Circuit said:

"However closely the plaintiff controlled Innisfail as its sole stockholder, and he was also its president, it is clear that that corporation had for years before this transaction bought, sold, and held, and did thereafterwards buy, sell, and hold, large amounts of securities. It had a business existence and was a corporate entity separate and distinct by itself with assets and liabilities of its own part from those of its sole stockholder. *And the fact that it had but one stockholder did not prevent its having such a separate legal status. Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415. * * * As such a corporation, it was in law a legal person whose acts were its own in making the purchase of these securities and when the purchase was made and the shares transferred to it Innisfail was the sole owner of them. * * * The existence of a motive to reduce or avoid taxation by making a valid sale is of no consequence for the plaintiff had the right to give effect to that purpose by whatever lawful means he had available. *Gregory* v. *Helvering,* 293 U. S. 465" (R. 457-8).

In *Commissioner* v. *Eldridge,* 79 Fed. (2d) 629, C. C. A. 9th Cir., the taxpayer sold stock to a controlled corporation at its then market value, and claimed deductions representing losses thereon.

The Board held that the deductions were allowable and its decision was sustained by the Circuit Court of Appeals:

"The facts found by the Board of Tax Appeals in

this case do not, in our opinion, warrant us in disregarding the separate entity of the corporation. The fact that respondents owned all its stock and were in complete control of it is no reason for disregarding its separate entity." (Citing decisions.)

"It is argued by the Commissioner that the transfers by respondents to the corporation were made for the purpose of establishing a deductible loss for income tax purposes. This, if true, is unimportant. A taxpayer may resort to any legal method available to him to diminish the amount of his tax liability." (Citing decisions which include *Gregory* v. *Helvering*.) (p. 631.)

Grand Rapids Trust Company, et al., administrators v. *Commissioner*, 34 B. T. A. 170, is a case decided for the taxpayer on facts exactly parallel with those in the instant case. It involves an individual's sale of securities to a controlled corporation on the installment plan and their resale by the corporation. It does not appear that the Commissioner sought a further review of that case although he did not acquiesce in the Board's decision. We quote:

"The respondent's determination, as has been seen, was predicated upon a complete disregard of the assignment by Smith to the corporation, the reason for such disregard being the alleged full control by Smith of the corporation. The separateness of Smith and the corporation as juristic entities and also as taxpayers cannot be disputed, and there is no evidence which would justify lack of recognition of either. *Burnet* v. *Clark*, 287 U. S. 410. The corporation, so far as appears, was not merely a technical legal entity but was a substantial being which had been carrying on business for many years before the transaction with Boyle. It cannot be regarded as a mere ephemeral taxsaving device, as in *Gregory* v. *Helvering*, 293 U. S. 465, even if such a characterization justified its disregard. Although transactions between an individual and a corporation controlled by him, like intra family transactions, always invite close scrutiny to ascertain their genuineness, *Commissioner* v. *Eldridge*,

79 Fed. (2d) 629, the relation between participants is not alone sufficient to require that transactions between them be ignored." (p. 171.)

In this connection we note that the citations of the instant case by the United States Board of Tax Appeals present an interesting contrast. Prior to its reversal by the Circuit Court of Appeals, the Board twice cited its decision in this case with approval. (*W. & K. Holding Corporation*, 38 B. T. A. 830 and *Mead Corporation*, 38 B. T. A. 687.)

Since its reversal the Board has cited the reversing decision of the Circuit Court of Appeals with approval in the appeals of *Von's Investment Co., Ltd.*, 39 B. T. A. 1141, *Jackson*, 39 B. T. A. 937, and *Loewenberg*, 39 B. T. A. 844. The last named of these appeals is the only one arising on facts or with issues closely similar to those in the case at bar; and three members dissent from that decision. The Circuit Court's decision in the instant case, is last cited in a dissent from the Board's decision on the appeal of Smith, which will appear as decision No. 67 in 40 B. T. A.

In the Smith case, the Board had before it the square question whether it should disregard the legal consequences, for tax purposes, of a sale to be a controlled corporation. The majority decision of the Board is that the separateness of the corporation should not be disregarded. There is an extended dissenting opinion, contending for the disregard of the separate corporate entity when it is "an anticipatory arrangement" with tax consequences in view,—a characterization equally applicable to the selections of the forms in which most important business transactions are accomplished. In this dissenting opinion the minority of the Board distinguishes *Smith* v. *Higgins* (cited above), which arose with respect to sales to the

very same corporation by the same stockholder, on the ground that in the prior case a jury had found the sales to be genuine, while the dissenting members felt that the Board should find otherwise as to the sales on which it was to pass (p. 16),—which illustrates the confusion which will result if the genuineness of transactions is made dependent on the motives which impelled them.

We submit that it is an utter perversion of the principle that "substance rather than form should control," to claim that it justifies treating the receipt of money by a controlled corporation as individual profit to its stockholder. In stating that the stockholder could terminate the corporate plan "almost as rapidly as he created it," in its decision in the instant case, the Circuit Court overlooked the fact that every corporate termination has direct income tax consequences for its stockholders,—which should not be if a stockholder's "effective domination and control" over the corporate funds is to make them income to him when first received by the corporation.

4. As to the facts.

Facts as found by the United States Board of Appeals, if sustained by substantial evidence, are conclusive upon Circuit Courts of Appeals. To the extent that the opinion of the United States Circuit Court of Appeals in the instant case reflects material departures from the facts as found, that Court has fallen into error. Naturally, citations of its opinion, in subsequent cases, are based on its version of the facts, and should be accepted with caution.

We therefore call the Court's attention to certain of the findings of the United States Board of Tax Appeals, and one statement of fact from the opinion proper:

"The petitioner, prior to 1933, had had some

thoughts relating to the formation of an investment corporation or association similar to that known as The John Griffiths Investment Trust. He instructed Markheim, on January 9, 1933, to form an investment corporation as Markheim had suggested" (Rec. 61).

"The G. W. G. Corporation in 1933 invested in various stocks other than the stock of the Oakridge Cemetery Corporation" (Rec. 64).

"It" (the corporation) "paid a salary and dividends to the petitioner, which he reported in his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. *The steps taken and the reality of the corporation cannot* be disregarded" (Rec. 67).

The following is from the opinion of the Circuit Court of Appeals. The italicized observations of fact appear to us to be both contrary to the Board's findings and without support in the record:

"Here, as there, *the sole object* was the consummation of a preconceived plan *not to organize a corporation for a business purpose*, but merely as a step in the contrivance to escape taxation. *It performed, as was intended from the beginning, no other function with the possible exception of the subsequent transaction of some business not inconsistent with the scheme of which it was a part*" (Rec. 88).

"We are presented with a situation in which the taxpayer and his counsel intentionally *formulated a contrivance for the sole purpose* of enabling the taxpayer to avoid the payment of tax" (Rec. 87).

The testimony, "I had had in mind the forming of such a corporation over a period of some time; having had considerable to do with the John Griffiths Investment Trust, I was a little familiar with such corporations • • •" (Rec. 14) affords sufficient basis for the first quotation from the Board's decision. The reality of the Corporation is demonstrated by its 1933 investments, totalling

over $175,000 in addition to the purchase here in dispute. (Petitioner's Exhibit 5, Rec. 79, In evidence at Record 16.) There is no justification for the Circuit Court's characterization of such investments as a "possible exception of transacting some other business."

It may be presumed that, throughout its corporate existence, G. W. G. Corporation has complied with the law by making returns and paying Income, Capital Stock, and other taxes;—also that its controling stockholder has, in his returns, accounted for all moneys received from it. There is affirmative evidence that he did so for the year 1933. If G. W. G. Corporation is not to be considered a corporation "organized for a business purpose," the question is pertinent whether it should have been treated as a corporation for any purpose of Federal taxation. If at one stage of its existence it be regarded as a corporation, and at another as no corporation,—just when did the change occur, and what are the criteria of the change?

Such problems would not have arisen in the instant case, nor could the Circuit Court of Appeals have arrived at the decision under review, if it had observed the law as established by the decisions we now discuss.

A. *The findings of fact of the United States Board of Tax Appeals, quoted above, are conclusive, they being based on substantial evidence.*

In *Phillips* v. *Commissioner*, 283 U. S. 589, this Court was asked to pass on the constitutionality of the procedure specified in the Revenue Act for enforcing the collection of taxes, assessed against a corporation, from transferees of its assets.

One objection urged was that the assessment against the alleged transferee preceded any judicial determina-

tion of his liability. In discussing the judicial remedy which the transferee might invoke by petition to the United States Board of Tax Appeals, an administrative tribunal, this Court said:

> "Specific objection is made * * * to the rule under which the Board's findings of fact are treated by that Court" (a Circuit Court of Appeals) "as final if there is any evidence to support them. * * * Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings," (pp. 599-600).

This rule applies to statements of fact in the opinion of the Board as well as to formal findings. Such statements, if based on substantial evidence, amount to determinations of fact:

California Barrel Company v. *Commissioner*, 81 Fed. 2nd 190 (193) (C. C. A. 9th Circuit).

B. *The conclusions of fact drawn by the Circuit Court of Appeals should be disregarded.*

The Circuit Court of Appeals concludes the discussion in its opinion in the instant case with the statement:— "It is our view that what was done, including the corporate organization, was a mere mask to cover the real transactions."

The drawing of such conclusions, and clearly it is a conclusion of fact and not of law, is not within the province of the Circuit Court of Appeals in such cases. As a rule, Circuit Courts of Appeals have been careful to avoid encroaching on the province of the United States Board of Tax Appeals in this respect. For example, in the case of *Von's Investment Co. Limited* v. *Commissioner*, 92 Fed.

2nd, 861 (C. C. A. 9th Cir.), the Circuit Court of Appeals for the Ninth Circuit, was passing on the question whether two transfers of similar stocks to a corporation, made some seven weeks apart, should be treated as "property transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation." (See 112 b-5 of Revenue Act of 1928.) The Court said that if both were made in furtherance of a plan embodied in a then existing contract, they might be treated as one transfer by "one or more persons." The Court added:

> "As to the intent or purpose with which these transfers were made, the Board made no finding. Such a finding is necessary to a proper decision of the case, and should be made by the Board, not by this court. In reviewing decisions of the Board, we are not authorized to make findings of fact. Our review is limited to questions of law" (Page 864).

and remanded the case to the Board for further findings.

The drawing of factual conclusions by Circuit Courts of Appeals, in such cases, has recently drawn sharp comment from this Court.

Thus, in *Elmhurst Cemetery Company* v. *Commissioner*, 300 U. S. 37, this Court reversed a decision of the Circuit Court of Appeals for the Seventh Circuit on the sole ground of such an encroachment on the functions of the Board:

> "This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board" (Page 40.)

Also in *Helvering* v. *Rankin*, 295 U. S. 123, the Court reversed a decision of the Circuit Court of Appeals for the Third Circuit, in which the Circuit Court had made certain assumptions of fact not justified by the Board's decision. There, as in the instant case, the Circuit Court

had not specified its departures from the Board's findings; but the departures are equally clear.

This Court said:

> "Thus it was only by departing from the facts as found by the Board of Tax Appeals that the court found justification for reversing the Board's decision. • • •
>
> "The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made. • • •
>
> "Unless the finding of the Board involves a mixed question of law and fact, the court may not properly substitute its own judgment for that of the Board. If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. Compare *Helvering* v. *Taylor*, 293 U. S. 507, *ante*, 623, 55 S. Ct. 287; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 308, 77 L. ed. 318, 324, 53 S. Ct. 161. And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record" (Pages 131-132).

We submit that in the instant case the Circuit Court's encroachment by the Court of the province of the Board of Tax Appeals is so clear that that alone requires a reversal of the decision. Furthermore, it is obvious that the Board's decision must be affirmed if its factual determination be accepted.

We respectfully request that the opinion of the Circuit Court of Appeals for the Seventh Circuit be reversed.

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Attorney for Petitioner.

HERMAN A. FISCHER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 49

GEORGE W. GRIFFITHS,
(Petitioner) Appellee,

vs.

COMMISSIONER OF INTERNAL REVENUE,
(Respondent) Appellant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

STATEMENT.

Except for minor omissions, the Statement in respond-'s brief correctly reflects the formal findings of fact de by the United States Board of Tax Appeals. How-er, we find it necessary to correct what appear to us to unfounded statements of fact, and misconstructions of record, appearing in the Summary of Argument and the Argument, in respondent's brief:

1. In a footnote, brief page 13, counsel state that, in the instant case, "*the income had already accrued in the taxpayer's favor.*" This obviously means that, when taxpayer sold the stock in question to G. W. G. Corporation, he had already concluded a transaction with Lay in which income "had already accrued" to him. Yet, in respondent's Statement (Brief, p. 4), it appears that, when G. W. G. Corporation was organized and the stock sold to it, petitioner had merely been advised "that Lay *would probably enter into a settlement* which would take the form of a repurchase of the shares."

2. In brief, page 22, it is asserted that petitioner owed to one Harrison a debt of $14,556.08. The Court will look in vain in the Board's findings of fact for any reference to such a debt. To be sure, a payment of $14,556.08 to Harrison is mentioned in the deficiency letter, as a deduction allowed by the Commissioner from the amount received from Lay. (Rec. 7.) Furthermore, the original agreement between petitioner and G. W. G. Corporation recited that the corporation was "to assume and perform the obligations of said George W. Griffiths to pay E. H. Harrison 15% of the net amount of money (after the payment of all expenses) received on the sale of said stock to said Robert D. Lay." (Rec. 62.)

While the previous understanding between Griffiths and Harrison is entirely outside the issues and naturally does not appear in the record, it is reasonably apparent that it had to do with services Harrison was to perform in connection with the controversy with Lay. Certainly petitioner was then under no money obligation to Harrison. Relief from a nonexistent debt is not income.

3. At the end of the extended footnote, brief page 20, it is stated that petitioner made no showings as to certain matters, which as a matter of fact had been considered

outside the issues, correctly as we believe; but on one of them there does chance to be a showing.

It is said that there was no showing "that the transactions" (scheduled at Rec. 59) "constituted anything more than the investment and reinvestment of the money received from Lay."

In order to show that G. W. G. Corporation was a genuine corporation, which transacted business having no connection with the transactions here in question, petitioner had introduced in evidence a schedule showing the corporation's 1933 purchases, consisting of seven other blocks of stock, the total amount of such other purchases being $179,762.50. The schedule also shows the dates of sale of those of these blocks of securities which were subsequently disposed of. Only two of the blocks were sold in 1933, and the proceeds therefrom amounted to $31,178.00. (Rec. 59.) In the deficiency letter, the Commissioner asserts that in the sale of the cemetery stock to Lay there was realized a profit of $75,433.92, over a cost of $8,000, or a total realization of $83,433.92. (Rec. 7.) Obviously, the corporation's outlay of $179,762.50 was not a mere investment of this $83,433.92 and reinvestment of the $31,178.00 realized from 1933 sales. This would be true even if it did not affirmatively appear that G. W. G. Corporation, in that year, also paid petitioner a salary of $10,000, and dividends of $20,000, both of which he returned as income to himself (Rec. 27-29), as well as $3,368.13 as an installment of principal and as interest on the purchase price (Rec. 65).

It follows as a mathematical certainty that these transactions were "more than the investment and reinvestment of the money received from Lay."

SUMMARY OF ARGUMENT.

1. The sale to Lay was by G. W. G. Corporation and should not be treated as petitioner's individual transaction.

The first heading of respondent's brief really presents two distinct arguments: *first*, that petitioner's sale to G. W. G. Corporation did not come within the installment sale provisions of the statute, and, *second*, that this sale to G. W. G. Corporation should have been ignored, and petitioner's income computed on the theory that he himself was vendor in the sale to Lay, in which case there could be no question of installment sales.

Since the first of these mutually exclusive arguments is reiterated as point 3 of respondent's brief, we reply to it under the third point of this brief; and we confine our first point to the question whether petitioner or G. W. G. Corporation was the vendor in the sale to Lay.

2. The legal consequences of petitioner's transactions with G. W. G. Corporation, and of G. W. G. Corporation's transaction with Lay, may be determined as questions of law. However, such determination should not be predicated on assumptions of fact not supported by the record.

3. Issues outside the record:

(a) The decision of the Circuit Court of Appeals cannot be affirmed on grounds suggested for the first time in respondent's brief filed in this Court and entirely outside the record.

(b) Petitioner was entitled to reflect his sale to G. W. G. Corporation, in his tax return, as an installment transaction.

(c) Petitioner did not realize income through the discharge of a supposed debt to one Harrison.

ARGUMENT.

1. The sale to Lay was by G. W. G. Corporation and should not be treated as petitioner's individual transaction.

In petitioner's original brief, attention was called to the way in which he had returned his transaction with G. W. G. Corporation, in order that the Court might clearly understand the exact nature of the tax-saving motive which admittedly was present, and at the same time to make it clear that petitioner has been consistent in treating G. W. G. Corporation as a separate taxpayer, in that he returned, as personal income to him in the same taxable year, $34,933.13 received from that corporation. (Brief, p. 10.)

Counsel have seen fit to disregard the latter aspect of the facts, even going so far as to omit mention (in their Statement) of the Board's specific finding that the taxpayer returned $1,436.15 of interest (Rec. 65), which presumably included an interest payment of $1,243.13 by G. W. G. Corporation. However, we erred in our prediction that no one would question the correctness of petitioner's return of his sale to G. W. G. Corporation (on an instalment basis), assuming the recognition of the reality of this sale.

Respondent's first point (Brief, p. 9) begins: "The transaction" (presumably the sale to G. W. G. Corporation) "did not constitute an installment sale within the meaning of the statute." Under that point, counsel present the mutually repugnant propositions, (1) that (as a matter of income tax law) there was no "sale" to G. W. G. Corporation at all, and (2) that this "sale" to G. W. G. Corporation did not come within the scope of the Section relating to installment sales.

We confine the first portion of this brief to the first proposition; and claim that G. W. G. Corporation has been found to be a legal entity; and that it, and not petitioner, made the sale to Lay. Consequently, petitioner is not taxable individually upon the theory that the corporation's sale to Lay was his individual transaction.

Counsel open their argument with a denunciation of the "scheme" to avoid taxes or postpone them by spreading them over a period of forty years (subject to statutory acceleration in case of transfer by death or otherwise), and state that the "avoidance" would be through the removal of the individual profit from the higher brackets.

Confessedly, be the hardship small or great, a taxpayer must pay taxes computed in accordance with the Statute; *but it is "his legal right to decrease the amount of what otherwise would be his taxes by any means which the law permits."* (*Gregory* v. *Helvering*, 293 U. S. 465, 469.) Inasmuch as, before a previous tribunal, respondent and his counsel have characterized petitioner's effort to exercise this right as a "nefarious tax evasion scheme," and as calling for a fraud penalty (Rec. 67, 68), and now present the case to this Court as one of a "transparent and meaningless device" and an "attempt to stage an empty ritual," (Brief, pp. 10, 13), it may be appropriate to call the Court's attention to the fact that petitioner was faced with a hardship the effect of which he was seeking to mitigate.

In 1931 petitioner owned this stock (acquired from Lay), which had cost him $100,000 and had proved of small apparent value. He then had no knowledge of any chance to recoup this loss. Wishing to effect some tax saving, he then arranged for its sale at what apparently was its then fair value. However, a taxpayer's deductions for losses are strictly circumscribed by stat-

ute. His maximum saving was limited to 12½% of his "capital net loss." (Par. 208(c) Revenue Act of 1926.) If his bracket called for a lower rate, this percentage would be reduced; and, if his deductible loss exceeded the entire year's income, the excess loss would have no tax effect. At times, Congress has recognized the tax hardship which arises from a concentration of losses in a single year, by permitting some carry-over of the deficit. No such provision was then in effect.

Having obtained a tax benefit, thus circumscribed, petitioner learned, a year later, that he had been victimized in his original investment, and that, upon reacquiring the stock, he had a chance to force restitution and recoup the larger part of his loss.

However, if he himself succeeded in accomplishing this, by direct cash sale, he would be faced with higher bracket surtaxes, and incur taxes greatly exceeding the tax advantage which he obtained the year before. The taxpayer suffers, and the Commissioner gains, each time a single year discloses a concentration either of profit or of loss; and if respondent should prevail in this proceeding, this petitioner will have experienced both misfortunes.

That petitioner should wish, and openly seek, to spread into lower brackets what was in fact but the recoupment of a previous loss was neither "nefarious" nor "sinful." (Rec. 67). Yet from the time respondent opened the bombardment with a charge of fraud, long since abandoned as untenable, petitioner has been made a target for epithet and epigram. Counsel, before three successive tribunals, have shown the zeal of crusaders in producing new theories for exacting maximum taxes, often taking liberties with both facts and pleadings; and they consistently have ignored or belittled the corporation's substantial business activity, and petitioner's return of the income which accrued to him from its operations, in-

come which respondent, in part at least, should clearly have eliminated were he consistent in his attempted restatement of petitioner's return.

We submit, in the words of this Court in the very case upon which counsel ground their argument, that *"the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended."* (*Gregory* v. *Helvering*, 293 U. S. 465 (469). The Board's findings of fact, when supported by substantial evidence are binding on all appellate tribunals; and we therefore have the simple question whether, within the meaning of the income tax statutes, petitioner personally sold the stock to Lay. The Board has found that he did not. Counsel, in contending that he did, rely almost exclusively on the cases of *Gregory* v. *Helvering*, 293 U. S. 465, and *Minnesota Tea Company* v. *Helvering*, 302 U. S. 609.

Insofar as this question is concerned we look in vain for parallels in the issues of those cases. In the former case, the money (held to be income to the individual stockholder) had actually reached her "individual pocket" from the pocket of what counsel might term her *alter ego*. The problem was whether the money had arrived at that destination without incurring individual tax, because its transfer came under the so-called "reorganization provisions" of the Revenue Act.

The present case presents converse facts. While counsel studiously avoid admitting it, they cannot deny that the taxpayer has faithfully made returns of individual income covering all funds which he individually has received from G. W. G. Corporation. This he must continue to do; but respondent would also tax him on what he has not received.

The problem really is not whether income shall entirely escape tax, but whether there shall be duplication, and, in some degree, even triplication, of tax on certain

receipts. To the extent that they represent profit to it, they have been returned as such by the corporation. All moneys paid by the corporation to the taxpayer have been reported, and presumably must continue to be reported, by him individually; and now it is proposed to tax as an individual receipt the initial payment of the funds to the corporation.

To be sure this Court, in the case of *Gregory* v. *Helvering*, emphasized the fact that a corporation, which momentarily held certain assets, was created solely for that purpose and was immediately "put to death," and held that its activity for a day did not make it a real participant in a genuine reorganization.

Realizing that the genuineness of the controlled corporation (as a business entity and not a mere technical existence) might be of moment in the instant case, evidence was produced by petitioner, and findings have been made by the Board, which clearly differentiate this case from that feature of the facts in *Gregory* v. *Helvering*.

Aside from these circumstances, *Gregory* v. *Helvering* is merely an authority, first, as to the construction of Section 112 (the "reorganization" section of the Revenue Act), and, second, for the proposition that, in considering the genuineness of a transaction, the Court will consider what was really done, a principle for which we have consistently contended.[1]

[1] It is true that *Gregory* v. *Helvering* has been repeatedly cited, not only in cases having close similarity in the facts, but in cases involving somewhat different questions but in which the general principle just mentioned has seemed applicable. Counsel refer (Brief, p. 17) to page 26 of a brief in the pending case of *Higgins* v. *Smith*, as listing a considerable number of such cases. They might have cited an equally imposing list of cases in which the Commissioner has been unsuccessful in efforts to use the Gregory case as an authority for denying to taxpayers the income tax consequences of genuine transactions, primarily because tax saving motives influenced the selection of their forms. A few such cases are: *Lea* v. *Commissioner*, C. C. A. 2d Cir., 96 Fed. 2d 55 (57); *Smith* v. *Higgins*, C. C. A. 2d Cir., 102 Fed. 2d 456 (458); *Commissioner* v. *Freund*, C. C. A. 3rd Cir., 98 Fed. 2d 201 (207); *Humphreys* v. *Commissioner*, C. C. A. 2d Cir., 88 Fed. 2d 430 (432); *Chisholm* v. *Commissioner*, C. C. A. 2d Cir., 79 Fed. 2d 14 (15); *Commissioner* v. *Eldridge* C. C. A. 9th Cir., 79 Fed. 2d 629 (631); *Helvering* v. *Johnson*, C. C. A. 8th Cir., 104 Fed. 2d 141 (143).

Most of what we have said with respect to *Gregory* v. *Helvering* is equally applicable to *Minnesota Tea Company* v. *Helvering*, 302 U. S. 609. In that case the corporation, taxpayer, paid certain moneys to its stockholders one consideration for which was that they would in turn pay a specified part thereof to corporate creditors. The question was whether this component was received by the stockholders as a "distribution" by the corporation. The word "distribution" as used in the Statute obviously is equivalent to "dividend." The actual decision merely was that calling this payment a "distribution" did not make it one.

Counsel also cite *Helvering* v. *Bashford*, 302 U. S. 454, also arising under the "reorganization" section. There the Atlas Company was really purchasing three corporations through the medium of causing their assets to be transferred to a new subsidiary. In the first step of the agreed program, shares of the three corporation were turned over to Atlas; and it was argued that this made it the owner of their stock and therefore a "party" to the "reorganization." This Court referred to such "ownership" as "transitory and without real substance." That language has no application to this case, in which G. W. G. Corporation acquired the stock subject to no duty to sell or transfer it, but did sell it and did retain and use the proceeds.

Space will not permit an analysis of the applicability of all the various slogans and epigrams with which counsel seek to buttress their argument; but we might mention two:

The first is "an anticipatory attempt to deflect income for tax purposes." One may find such an "anticipatory attempt" in the selection of the form in which practically every important business transaction is completed. In

fact, various provisions which counsel would characterize as "of a relief character" have been included in revenue acts for this very purpose. Examples are: capital gain provisions and provisions permitting optional methods of returning the proceeds of corporate liquidations if carried on in certain forms. As a striking example of appropriate "anticipatory attempts," we mention the law with respect to corporate distributions in kind. Assume that the value of a corporate asset has advanced over cost, if the corporation itself sells this asset it will be taxed on its profit; and then, when the profit reaches the stockholders in a corporate distribution, they also will be taxed. However, the corporation, by "anticipatory arrangement," may make a distribution in kind without being taxed with any profit. The stockholders reflect this dividend in their individual returns at the then value of the asset received, reporting further profit or loss in case of any variation of the price at which they sell from the reported value at receipt. (See Article 22-A-21 of Regulations 101; also *General Utilities and Operating Company* v. *Helvering*, 296 U. S. 200).

The General Utilities decision is of particular interest both because of a similarity of facts to the instant case, and because, in the decision which was reversed by this Court, the Circuit Court had made full use of the catch words "anticipatory arrangements" and "conduit" (discussed below), as well as of such expressions as "transaction deliberately planned for the sole purpose of escaping taxation," "ostensibly making the sale" and "a plan, not to use the harsher terms of scheme, artifice, or conspiracy." (74 F. (2d) 972, at 976.)

In that case, as in this, a sale of certain stock had been discussed but not yet agreed upon. In that case, as in this, a transfer was made of the stock (there through a dividend in kind and here a sale to a controlled corpora-

tion) with the confessed anticipation that the transferee would proceed to sell the stock. However, this Court paid little attention to the invectives in the Circuit Court's opinion; and held that the Commissioner's claim, that the corporation realized profit in its distribution to its stockholders, was without merit. (p. 206.)

We called attention above to the word "conduit", appearing in *Gregory* v. *Helvering* and repeated on Brief p. 14. That word strikingly describes a transaction under which certain funds, in what is really a single transaction, are routed in a particular way and are claimed to have promptly arrived at a desired destination without incurring the tax consequences which would have existed had the transaction been simplified.

The expression is not applicable to this case for the two reasons: First, Here there was not one transaction but two independent transactions, with different participants, a sale to a corporation by the taxpayer, and a subsequent sale by that corporation to a third person. The subsequent sale had not been contracted for when the first sale was made; and the first sale was not conditioned upon the second being completed, although such was the expectation. Second, The proceeds, as such, will never arrive at the destination referred to. The corporation, which received these proceeds, has paid substantial amounts to its stockholder, and on these he has paid tax. His installment sale contract gave him a contract right; but it arose before the Lay transaction, and gave him merely an interest-bearing debt, taxes with respect to receipts on which he has paid and is paying.

Its 1933 transactions sufficiently establish the G. W. G. Corporation as a live, active corporation, such as the Board found it to be; *and its genuineness is a fact which must be accepted if supported, as it is, by substantial evidence.*

2. The legal consequences of petitioner's transactions with Lay, may be determined as questions of law. However, such determination should not be predicated on assumptions of fact not supported by the record.

In our original brief we emphasized the principle that issues of fact are determined by the Board, and the Board only, because the Circuit Court had clearly drawn and acted upon its own conclusions of fact. That this emphasis was timely is confirmed by the fact that, in his brief filed in this Court, respondent has again overstepped both issues and facts.

It is no reply to this point to cite cases in which this Court and Circuit Courts have determined questions of law,—as, for example, whether a specific transaction was a "reorganization" as described in the Statute.

Counsel cite no case establishing a principle of law to the effect that a sale by a controlled corporation gives rise to income to its stockholder,[2] nor can support for such a principle be found in the definition of "gross income" found in the only statute cited in the respondent's brief which could possibly directly bear on the issues in this case.

On the contrary, to paraphrase the language of Justice Holmes in *Klein* v. *Supervisors*, 282 U. S. 19:

> "a corporation is a person and its ownership is a nonconductor that makes it impossible to attribute its transactions to its stockholders." (p. 24.)

3. Issues outside the record:

(a) The decision of the Circuit Court of Appeals cannot be affirmed on grounds suggested for the first time in respondent's brief filed in this Court and entirely outside the record.

The law is settled that, in reviewing decisions of the

[2] A possible exception is found in a decision, by a divided Board, rendered after its decision in the case at bar had been reversed. See, however, pages 17 and 18, of petitioner's original brief.

United States Board of Tax Appeals, Circuit Courts must remain within the scope of the pleadings before the Board. It is equally settled that this Court reviews decisions of Circuit Courts on the basis of the issues as they were, not as they might have been.

In the first instance, issues are made up from:

(1) The deficiency letter, which must be appended to the petition.

(2) The assignments, in the petition, of errors claimed to have been committed by the Commissioner, with statements of fact supporting such assignments.

(3) The answer of the Commissioner, which must "fully and completely advise the petitioner and the Board of the nature of the defense".

(Rules 6 and 14 of the Board.)

In the instant case, the deficiency letter stated:

> "The alleged assignment of this stock to G. W. G. Corporation" (organized on the day of the sale to it, January 10, 1933) "has been ignored and the transaction treated as a sale by you for your account." (Rec. 7.)

In his petition the taxpayer assigned as errors:

> "The respondent has ignored a sale and assignment by the petitioner to G. W. G. Corporation of 5000 shares of the capital stock of Oakridge Cemetery Corporation * * *;"

also,

> "The respondent has erroneously treated a sale by G. W. G. Corporation of said 5000 shares" * * * "as a personal transaction of petitioner's and not as a sale by said corporation." (Rec. 3.)

While, in his answer filed with the Board, the Commissioner indulged in various general denials, he did make the following specific averments reflecting his version of the facts:

> "Petitioner" (taxpayer) "received information that Lay had been guilty of misrepresentation and

fraud. • • • After some controversy Lay acceded to the petitioner's demand, and paid the petitioner $100,000 by check • • • and the petitioner returned the 5000 shares to Lay."

"• • • The petitioner realized a taxable profit of $75,433.92 on the resale of the 5000 shares to Lay." (Rec. 10.)

In his petition for review by the Circuit Court of Appeals, and in his assignment of errors to that Court, respondent kept within the issues as pleaded, saying:

In the petition for review,

"For this" (5000 shares of Oakridge Cemetery) "stock a check was received from Lay in the amount of $100,000;" also, "The issues involved" (before the Board) "were (1) whether the petitioner should have reported the profit on the sale to Robert D. Lay of the 5000 shares," etc. "and (2) (an issue of fraud, as to which counsel stated that they "do not here assert any fraud").

In the assignments of error,

"The Board erred in finding that petitioner, during 1933, made a bona fide sale to G. W. G. Corporation of 5000 shares of stock of the Oakridge Cemetery Corporation."

also,

"The Board erred in failing to find that the sale of 5000 shares of Oakridge Cemetery stock to Robert D. Lay during 1933 was in fact a sale by the petitioner." (Rec. 74-75.)

It is suggested for the first time, by brief filed in this Court, that the Circuit Court's reversal of the decision of the Board of Tax Appeals may now be justified on the grounds that, even giving effect to the separate status of G. W. G. Corporation, petitioner nevertheless realized income, fully returnable and not fully returned by him in 1933, as follows:

(a) Acquisition by petitioner of a promise by

G. W. G. Corporation to pay him in installments the sum of $85,000.[3]

This item, it is claimed, should have been returned in full on the ground that petitioner was not justified in using the installment method in reporting this sale.

(b) The payment by G. W. G. Corporation of a personal debt of petitioners in the sum of $14,566.08. (Brief, pp. 22-23.)

Before discussing these two items, we call the attention of the Court to the fact that, in presenting them, counsel have gone entirely outside the pleadings. Never before has there been the slightest suggestion that petitioner realized income through the discharge of any supposed indebtedness from him to one Harrison. The record is equally devoid of any previous claim, or even suggestion, that petitioner's sale to G. W. G. Corporation was not an installment sale within the meaning of the Act.

In *General Utilities and Operating Company* v. *Helvering*, 296 U. S. 200 (already cited), this Court reversed a decision of the United States Court of Appeals for the Fourth Circuit (which, in turn, had reversed a decision of the United States Board of Tax Appeals) because the Circuit Court's reversal was on grounds not raised before the Board. The following language from this Court's decision is so specifically applicable that further comment would seem superfluous:

> "The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board. The petition for review relied wholly upon the first point; and, in the circumstances, we think the court should have considered no other. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised. • • •
>
> "Here the court undertook to decide a question not

[3] In this portion of their brief, counsel disregard the deductions from this $85,000, of petitioner's cost basis and the expense incurred in the sale of the stock.

properly raised. Also it made an inference of fact directly in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever." (pp. 206, 207.)

(b) Petitioner was entitled to reflect his sale to G. W. G. Corporation, in his tax return, as an installment transaction.

Counsel cite a textbook, and two decisions for the proposition that the installment sale provisions must be strictly construed against the taxpayer. (Brief, pp. 10, 11.) The second decision is by this Court (*Helvering* v. *Inter-Mountain Insurance Co.*, 294 U. S. 686) where the Court said, referring to statutory provisions permitting deductions in determining "the net amount to be taxed":

> "The rule that ambiguities in statutes imposing taxes are to be resolved in favor of taxpayers does not apply. Deductions are allowed only when plainly authorized." (689)

Assuming counsel's claim that the same rule of strict construction applies to "relief provisions" as is applied to "deductions," the conclusion would be that, if deductions for losses in sales to controlled corporations are allowable, the application of the installment sale provisions to transactions with controlled corporations would also be allowed. There is no more ambiguity in the statute's provision in one case than in the other.

As authority for the allowance of such deductions, see *Jones* v. *Helvering*, 71 F. (2d) 214 (C. of A. of D. C., certiorari denied 293 U. S. 583); also the decisions of this Court cited at page 217 of that case.

(c) Petitioner did not realize income through the discharge of a supposed debt to one Harrison.

The fact is that the respondent's treatment of the Harrison item was not questioned, and that it was not so much as mentioned in the issues made up by the pleadings.

Naturally the record contains little information regarding it.

However, it must be clear that, before petitioner's sale to G. W. G. Corporation, petitioner was not indebted to Harrison in the amount of $14,566.08 or in any amount. He was under no obligation to even sell any stock to Lay; and, if he did not, he would owe Harrison nothing. It may be that petitioner was under at least a moral obligation to Harrison not to sell the stock to another, who in turn might seek to sell to Lay,—unless the other would assume a similar obligation to Harrison; but the satisfaction of such a contingent obligation, be it moral or legal, could not constitute income.

We again respectfully ask that the decision of the Circuit Court of Appeals be reversed.

DELBERT A. CLITHERO,
Attorney for the Petitioner.

HERMAN A. FISCHER,
Of Counsel.

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No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1939

GEORGE W. GRIFFITHS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 60–70) is reported in 37 B. T. A. 314. The opinion of the Circuit Court of Appeals (R. 84–91) is reported in 103 F. (2d) 110.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 25, 1939 (R. 91). A petition for rehearing was denied on April 15, 1939 (R. 92). The petition for certiorari was filed May 10, 1939, and was granted October 9, 1939. The jurisdiction of

this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer in 1926 purchased securities for $100,000 which he sold in 1931 for $7,500, and was allowed a deductible loss in the amount of the difference. He subsequently learned of fraud in the original sale, and in 1933 was about to conclude a favorable settlement with his vendor, whereby the vendor would repurchase these securities for $100,000. In contemplation of the settlement the taxpayer reacquired the securities for $8,000. In order to avoid the income taxes that would accrue immediately against him with respect to the profit on the settlement, he organized a wholly owned corporation, and purported to sell the securities to that corporation on the installment plan, payments to be spread over a period of forty years. He then concluded the settlement with his original vendor, releasing him of all claims, but without revealing that he was purporting to act for an undisclosed principal, his corporation.

The question presented is whether he is taxable upon the profit realized from that settlement, or whether the interposition of the wholly owned corporation effectively precludes the tax.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(*a*) *General Definition.*—"Gross income" includes gains, profits, and income derived from

salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

SEC. 44. INSTALLMENT BASIS.

(a) *Dealers in Personal Property.*—Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price.

(b) *Sales of Realty and Casual Sales of Personalty.*—In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding $1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 40 per centum of the selling price, the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the

basis and in the manner above prescribed in this section. As used in this section the term "initial payments" means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

STATEMENT

The facts, as found by the Board (R. 60–65), may be stated as follows:

In 1926, taxpayer purchased from or through Robert D. Bay at a cost of $100,000, 5,000 shares of the capital stock of the Oakridge Cemetery Corporation. On October 30, 1931, he sold those shares to the John Griffiths Investment Trust for $7,500.[1] For the year 1931, taxpayer, in his income tax return, claimed and was allowed a deduction of $92,500, as a loss from these transactions (R. 60–61).

Taxpayer, late in 1932, discovered that Lay had probably defrauded him in the 1926 purchase of the shares in question. He consulted Harry Markheim, an attorney, who investigated and commenced negotiations to bring about a settlement. On January 9, 1933, taxpayer was advised by Markheim that Lay would probably enter into a settlement, which was to take the form of a repurchase of the shares by Lay for $100,000 (R. 61). Taxpayer on the following

[1] It further appears that shortly thereafter, on November 16, 1931, he repurchased those shares for $7,000, and again sold them to the same purchaser for $7,000 on December 30, 1931 (R. 60–61). However, nothing appears to turn upon that repurchase and resale.

day reacquired that stock for that purpose paying $8,000 therefor (R. 61).

Markheim at the same time informed the taxpayer that he might effect a postponement of the time of payment of the income taxes on the profit arising from the settlement and that he might also reduce the amount of tax by organizing an "investment company" to which he would sell the stock on the installment basis, permitting the investment company to make the settlement with Lay. Taxpayer had theretofore given thought to the formation of an investment corporation. On January 9, 1933, he instructed Markheim to organize an "investment corporation" as Markheim had suggested (R. 61).

Accordingly, arrangements were made on January 10, 1933, through the Corporation Trust Company, for the organization of the G. W. G. Corporation under the laws of Delaware, with three of Markheim's associates as directors (R. 61–62). The taxpayer at the same time paid $1,000 for all of its capital stock, which he still holds (R. 62).

On the same day, the taxpayer sold to G. W. G. the Oakridge Cemetery Corporation stock (which he had just reacquired on that same day) together with any rights that he might have "to require said Robert D. Lay to purchase said stock" (R. 61–62). In consideration therefor G. W. G. agreed (1) to pay him $85,000, over a period of forty years,[2]

[2] Payment was to be made, $1,000 immediately, $1,125 on January 15, 1933, and $2,125 on each January 15 thereafter until fully paid (R. 62).

and (2) to pay 15% of the net amount received from Lay to one E. H. Harrison in discharge of the taxpayer's obligation to Harrison (R. 62).

On January 11, 1933, the directors of the G. W. G. Corporation approved the sale of the Cemetery Corporation stock to Lay for $100,000 and authorized taxpayer "either in his own name or in the name of the corporation" to do whatever might be necessary or desirable to consummate the sale. Taxpayer, as treasurer of the corporation, was also authorized to invest the proceeds of the sale (R. 63).

The settlement with Lay was concluded on January 11, 1933, whereby Lay gave two checks payable to the taxpayer, one for $100,000, and the other for $80,000 in connection with other matters not here in dispute. The taxpayer transferred the Cemetery Corporation stock to Lay, and for himself, his heirs, and assigns, released Lay of all claims, etc., which the taxpayer or his assigns might have against him (R. 63–64). It does not appear that Lay or his attorneys knew of the taxpayer's prior sale to G. W. G., or that he was acting for G. W. G. as his undisclosed principal (R. 66).

The $100,000 check was endorsed by the taxpayer and deposited on January 12, 1933 in the bank account of G. W. G. (R. 64).

In accordance with the terms of the agreement between the taxpayer and G. W. G., he received $1,000 and $1,125 from it in 1933, although payments were made in March rather than in January, as

originally stipulated (R. 64). In addition he received $1,243.13 from G. W. G. in December 1933, as interest on the unpaid portion of the purchase price (R. 64).

In his income tax return for 1933, the taxpayer reported no income on account of his transaction with Lay, but he did report the sum of $1,875 which he treated as the profit embodied in the $2,125 installments received from G. W. G. during that year (R. 64–65).

The Commissioner rejected the purported installment sale of the stock by the taxpayer to G. W. G., and proposed to assess a deficiency computed by treating the transaction as a direct sale by the taxpayer to Lay and by including in the taxpayer's gross income the full profit realized upon that sale. The Board of Tax Appeals (six members dissenting) overruled the Commissioner, but the Circuit Court of Appeals reversed the Board.

SUMMARY OF ARGUMENT

1. This case presents an attempt artificially to convert a cash sale into an installment sale by introducing a dummy corporation as an intermediary, all for the purpose of tax avoidance. The corporation was wholly owned by the taxpayer and was created overnight with directors supplied from among the office associates of the taxpayer's counsel. It was at most a mere collection and remittance agency for the purpose of this transaction.

It is our position that the installment sales provisions were never meant by Congress to be applicable in a situation of this kind. Like the corporate reorganization provisions, the installment sales provisions are remedial in character, and were never intended to implement tax avoidance. They should be held inapplicable here just as the corporate reorganization provisions were held inapplicable in *Gregory* v. *Helvering*, 293 U. S. 465, where a ritualistic compliance with the literal language of the statute was nevertheless ruled to be beyond its scope. As it did in that case, the Court here should also look to what was actually done, and the substance of the present transaction consists of nothing more than a mere sale for $100,000 cash, the profit on which should immediately be subject to tax.

2. The question involved is not one of fact, but depends upon the legal consequences which flow from the facts. The Circuit Court of Appeals was therefore justified as a matter of law in reversing the Board. The *Gregory* case itself appeared in the same posture. The Board had ruled against the Government and the Circuit Court of Appeals reversed. Both the Circuit Court of Appeals and this Court treated the issue as one of law. We are here asking the Court to apply the principle of the *Gregory* decision to the present case, and if it is applicable, the scope of review should be the same.

3. An additional ground for supporting the decision of the court below may be found in the two-

fold consideration that the taxpayer in 1933 received taxable income (a) to the extent that his corporation discharged his obligation to E. H. Harrison, and (b) to the extent that he received the promise of his corporation to pay him $85,000, a promise that was backed dollar for dollar by cash over which he could exercise complete control.

ARGUMENT

THE TRANSACTION DID NOT CONSTITUTE AN INSTALLMENT SALE WITHIN THE MEANING OF THE STATUTE AND THE TAXPAYER MUST BE TREATED AS HAVING RECEIVED THE FULL PROFIT IN 1933.

1. This case presents an attempt by the taxpayer to postpone or avoid taxation by artificially converting a simple cash sale into an installment sale through the use of a wholly owned intermediary corporation created for that purpose. Had he sold the stock directly to Lay for $100,000 the full profit would immediately have become taxable to him.[3]

In order to avoid the immediate incidence of that tax, he undertook to route the sale to Lay through the newly organized G. W. G. Corporation, and

[3] That the profit realized would be taxable is clear. He had already had the advantage of a $92,500 deduction in 1931, and the recoupment of losses, etc., previously deducted in computing net income in earlier years, constitutes taxable income. Cf. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Commissioner* v. *Liberty Bank & Trust Co.*, 59 F. (2d) 320 (C. C. A. 6th); *Askin & Marine Co.* v. *Commissioner*, 66 F. (2d) 776 (C. C. A. 2d); *Putnam Nat. Bank* v. *Commissioner*, 50 F. (2d) 158 (C. C. A. 5th); *Marine Transport Co.* v. *Commissioner*, 77 F. (2d) 177, 179 (C. C. A. 5th).

went through the form of first making an installment sale of the stock to G. W. G. Thus, if he were successful in his scheme he could, by relying upon Section 44 (b) of the Revenue Act of 1932, spread the profit over a period of forty years. He would therefore achieve not only a postponement of tax, but would also actually reduce the aggregate amount of tax by removing the profit from the higher brackets and spreading it thinly over the years in lower brackets.

The Commissioner of Internal Revenue, ignoring the alleged assignment to G. W. G., treated the transaction simply as a sale by the taxpayer to Lay, and proposed to assess a deficiency by including the full profit in the taxpayer's gross income. We respectfully submit that the Commissioner was correct, and that the provisions for spreading the profit on installment sales in Section 44 (b) were never intended to apply to such an empty ritual as the taxpayer attempted to stage here.

The installment-sales provisions are remedial in character. They constitute a departure from the two principal systems of accounting, cash and accrual, and were designed to alleviate hardships to taxpayers by treating each payment partly as a return of capital and partly as gain, thus preventing the lumping of the profit in a single year in

disproportionately high surtax brackets.[4] But, as has been stated in 1 Paul and Mertens, *Law of Federal Income Taxation* (1934), § 12.01:

> It should be kept in mind that these provisions [installment sales] are of a relief character and accordingly the construction to be given them must be of a strict nature and against the party seeking relief.

See *Blum's, Incorporated* v. *Commissioner*, 17 B. T. A. 386, 389. Cf. *Helvering* v. *Inter-mountain Insurance Co.*, 294 U. S. 686, 689.

It is our position that the installment sales provisions were not intended to apply to such a situation as is presented here, just as the corporate reorganization provisions were held inapplicable in *Gregory* v. *Helvering*, 293 U. S. 465. In the *Gregory* case, the taxpayer's wholly owned corporation transferred securities to a new corporation, organized to avoid taxes, which issued all its shares to the taxpayer, and which was subsequently dissolved and liquidated by the distribution of the securities to the taxpayer.

[4] Prior to 1926, the Revenue Acts specifically recognized only two systems of accounting for reporting income, cash and accrual. Where sales were made on the installment plan, the application of either of these systems often led to hardship. The Commissioner sought to offer some relief through regulations, the first of which appeared in the 1918 edition of Regulations 33, Article 117. In 1926, Congress expressly recognized and approved this method. Section 212 (d) of the Revenue Act of 1926. And like provisions have appeared with some modification from time to time in all of the succeeding Revenue Acts. Section 44 of the Revenue Acts of 1928, 1932, 1934, 1936, and 1938.

The Court held that although the transaction complied with the literal terms of the statute with respect to corporate reorganizations, nevertheless it was not entitled to the exemption from tax that those provisions were intended to confer. The absence of any business purpose in the transaction placed it outside the scope of the statutory provisions. The Court looked to the substance of the situation, and concluded that the use of the specially organized corporation was but (p. 469)—

> an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner.

Similarly here, the creation of G. W. G. and the installment sale to it were but steps in the consummation of the preconceived plan of transferring the stock to Lay for $100,000. And just as the Court refused to apply the reorganization provisions in the *Gregory* case to a situation which they literally covered, so here the court below correctly refused to apply the installment sales provisions to the case at bar. In both, the particular provisions were remedial in character and never intended by Congress to be vehicles for tax avoidance. Here, as in the *Gregory* case, this Court is entitled to look to the substance

of what was done. The installment sale to G. W. G. followed by the use of G. W. G. as a reservoir for the money received from Lay to be syphoned out periodically by the taxpayer, and meanwhile subject to his plenary control, is indeed as transparent and meaningless a device as was unsuccessfully employed in the *Gregory* case. The same principles which governed the *Gregory* decision are likewise applicable here.[5]

The doctrine of the *Gregory* case was applied and extended in *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, where it was necessary to determine whether there had been, within the meaning of the statute, a "distribution" of cash by a corporation to its stockholders which it had received in a corporate reorganization. Any otherwise taxable gain to the corporation embodied in that cash would be exempt to the extent that it was "distributed" to the stockholders. The corporation in fact had distributed such cash to its stockholders on condition that they pay it over to creditors of the corporation in discharge of its debts. Thus, there was literally a "distribution" to stockholders, but this Court held, applying the *Gregory* case, that the transaction really amounted to nothing more than a payment to creditors, rather

[5] The principle of the *Gregory* case is particularly applicable here in view of the fact that the income had already accrued in the taxpayer's favor, and the device employed was merely an anticipatory attempt to deflect that income for tax purposes. Cf. *Burnet* v. *Leininger*, 285 U. S. 136; *Lucas* v. *Earl*, 281 U. S. 111.

than a "distribution" to stockholders. It denied the exemption, saying (pp. 613–614):

> Payment of indebtedness, and not distribution of dividends, was, from the beginning, the aim of the understanding with the stockholders and was the end accomplished by carrying that understanding into effect. A given result at the end of a straight path is not made a different result because reached by following a devious path. The preliminary distribution to the stockholders was a meaningless and unnecessary incident in the transmission of the fund to the creditors, all along intended to come to their hands, so transparently artificial that further discussion would be a needless waste of time. The relation of the stockholders to the matter was that of a mere conduit. The controlling principle will be found in *Gregory* v. *Helvering*, 293 U. S. 465, 469–470; * * *.

Applying those principles here, the taxpayer simply made a sale to Lay for $100,000, and he should be subject to the tax consequences which flow from that transaction. The interposition of G. W. G., his *alter ego*, could not change the essential character of the transaction. G. W. G. was merely a conduit. It was created on the eve of the settlement with Lay, and its directors were supplied from among the office associates of taxpayer's counsel. Its function in this transaction was at most simply that of a collection and remittance agency. It certainly was not buying stock on the installment plan. Lay was the one who was buying the stock, and he paid cash.

G. W. G. had no assets other than the $1,000 capital paid in by the taxpayer, and yet it agreed to buy the cemetery stock from him for $85,000. It was merely to hold the stock for a very short time and then pass it on to Lay. In fact the agreement between the taxpayer and G. W. G. refers to the sale of the stock to Lay, which had undoubtedly been arranged, though not finally consummated, the day before G. W. G. was created. It was contemplated from the beginning that G. W. G. was merely to collect the $100,000, pay about $15,000 thereof to a third party (E. H. Harrison) in discharge of the taxpayer's obligation to him, and to pay the remaining $85,000 periodically to the taxpayer, who meanwhile would exercise plenary control over the investment of the fund and who could at any time use it for any purpose he might choose. We submit that the Court is entitled as a matter of law to look at the substance of this transaction and treat it simply as a sale by the taxpayer to Lay, disregarding the attempted application of the installment sales provisions as outside the scope of the statute, just as the Court held the transactions in the *Gregory* case outside the scope of the reorganization provisions and looked to the essential character of the transaction there presented.

Here, as in *Helvering* v. *Bashford*, 302 U. S. 454, 458, the ownership of the stock by the intermediary corporation "was transitory and without real substance; it was part of a plan which contemplated the immediate transfer of the stock". And the same principle has been applied in a wide variety of cases

holding that a transaction carried out in accordance with a preconceived plan may not be split up into its component parts, and that the substance rather than the form of the transaction must control. See *Helvering* v. *Elkhorn Coal Co.*, 95 F. (2d) 732 (C. C. A. 4th), certiorari denied, 305 U. S. 605, rehearing denied, 305 U. S. 670; *Electrical Securities Corp.* v. *Commissioner*, 92 F. (2d) 593 (C. C. A. 2d); *Starr* v. *Commissioner*, 82 F. (2d) 964 (C. C. A. 4th), certiorari denied, 298 U. S. 680; *Bassick* v. *Commissioner*, 85 F. (2d) 8, 10 (C. C. A. 2d), certiorari denied, 299 U. S. 592, rehearing denied, 299 U. S. 623; *Hazelline Corp.* v. *Commissioner*, 89 F. (2d) 513 (C. C. A. 3d); *Commissioner* v. *Schumacher Wall Bd. Corp.*, 93 F. (2d) 79 (C. C. A. 9th); *Miller* v. *Commissioner*, 103 F. (2d) 58 (C. C. A. 6th); *Commissioner* v. *Ashland Oil & R. Co.*, 99 F. (2d) 588, 591 (C. C. A. 6th), certiorari denied, April 17, 1939, Nos. 692, 693, 757, 758, 1938 Term; *First Seattle D. H. Nat. Bank* v. *Commissioner*, 77 F. (2d) 45 (C. C. A. 9th); *Thurber* v. *Commissioner*, 84 F. (2d) 815, 818 (C. C. A. 1st); *Ahles Realty Corp.* v. *Commissioner*, 71 F. (2d) 150, 151 (C. C. A. 2d), certiorari denied, 293 U. S. 611; *Prairie Oil & Gas Co.* v. *Motter*, 66 F. (2d) 309, 311 (C. C. A. 10th); *West Texas Refining & D. Co.* v. *Commissioner*, 68 F. (2d) 77, 79–80 (C. C. A. 10th).

Nor is the principle of the *Gregory* case to be limited to cases dealing with corporate reorganizations, as indicated by the Board of Tax Appeals (R. 67). There is nothing in the statute which

even suggests that a realistic approach must be reserved exclusively for reorganization cases. We have discussed this matter at length in our brief in *Higgins* v. *Smith*, No. 146, to be argued immediately after the present case, and we there called attention (p. 26) to the impressive number and range of cases outside the field of reorganizations that have treated the principle of the *Gregory* case as applicable.

Moreover, in a subsequent case substantially identical with the case at bar (*Loewenberg* v. *Commissioner*, 39 B. T. A. 844), the Board of Tax Appeals itself has receded from the position taken by the majority of its members in the instant case. It referred at length with apparent approval to the opinion of the court below in the instant case, and concluded (pp. 851–852):

> This petitioner, like Griffiths, sold her stock upon the installment basis to a corporation created about 24 hours before the time of sale, with the definite intention and upon the advice of counsel that such an arrangement might postpone or limit the amount of her income taxes. Like the corporation organized by Griffiths, Malvina was created for the stated purpose of an investment company, but this petitioner would further justify the existence of Malvina by attempting to show that other considerations entered into its creation. We are not persuaded by petitioner's argument, nor by the elaborate minutes of Malvina, that such corporation was anything more than a contrivance intention-

ally created for the sole purpose of enabling the taxpayer to avoid a tax which would otherwise be due the Government.

In our opinion the real purpose in creating Malvina was to route through it the transfer of stock that petitioner had agreed to sell to Golo, and thus deflect from her the tax upon the income she would have received during the taxable year but for the intervening transfer on the installment basis to Malvina. Malvina's receipt of the purchase price of the stock from Golo, investment of the proceeds, and payment of the installment obligations as they matured were but incidental to the real purpose for which it was created. To permit a taxpayer thus to circumvent the tax laws and escape a tax which Congress plainly intended to impose would exalt artifice above reality and deprive the statutory provisions of all serious purpose. We, therefore, sustain the respondent's determination.

And shortly thereafter a unanimous Board applied the same principles in a closely analogous situation where the taxpayer had attempted to use a wholly owned corporation as the vehicle for selling certain securities owned by him. *Jackson* v. *Commissioner*, 39 B. T. A. 937. Cf. *Von's Investment Co., Ltd.* v. *Commissioner*, 39 B. T. A. 1141, 1144.

In *Groves* v. *Commissioner*, 99 F. (2d) 179 (C. C. A. 4th), the court refused to permit a taxpayer to

escape a tax upon otherwise taxable income by organizing two corporations owned and controlled by him in anticipation of diverting to them the income he knew he would receive. The court characterized the transactions as an anticipatory arrangement for the deflection of income and concluded that they must be disregarded for purposes of taxation. There, as here, the Circuit Court of Appeals disregarded the fact that the money was left with the corporation, in that case at least through the period of litigation. The concluding remarks of the court are particularly pertinent here (p. 183):

> The various steps taken by the petitioner were anticipatory arrangements for the deflection of income. The Wagegro and Firinbank Corporations were not created by the petitioner for the purpose of carrying on any real or actual business in the ordinary way but only in furtherance of the scheme to evade taxation. The Board was justified in looking through the form to the substance of the various transactions arranged and carried out by the petitioner. The petitioner in effect received and still enjoys the possession of the proceeds of the sale of the 23,000 shares of the Securities stock and should be taxed for the $575,000 as income for the year 1930.

Compare *Helvering* v. *Gordon*, 87 F. (2d) 663 (C. C. A. 8th); *S. A. MacQueen Co.* v. *Commissioner*, 67 F.

(2d) 857 (C. C. A. 3d); *McInerney* v. *Commissioner*, 82 F. (2d) 665 (C. C. A. 6th).[6]

[6] The petitioner places considerable reliance upon *Chisholm* v. *Commissioner*, 79 F. (2d) 14 (C. C. A. 2d), certiorari denied, 296 U. S. 641, where a partnership was created and employed by its members for tax avoidance purposes. However, the Circuit Court of Appeals there treated the partnership as having been organized for the purpose, in addition, of exercising normal business functions, and thus distinguished the *Gregory* case. We believe that the court in the *Chisholm* case erred in so confining the *Gregory* decision. It should be sufficient that the particular transaction has no business purpose, and it should not matter that the partnership or wholly owned corporation otherwise has a business purpose, if the particular transaction involved is wholly lacking in reality or business purpose. Thus in *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609 and in *Helvering* v. *Elkhorn Coal Co.*, 95 F. (2d) 732 (C. C. A. 4th), *supra*, there were transactions related to ultimate business objectives, but the essential element in both was the lack of any such business objective in the particular form in which the transactions were cast. The Second Circuit, however, has failed to give full play to the *Gregory* decision and unduly restricted it in the *Chisholm* case as it likewise did in an extended dictum in *Electrical Securities Corp.* v. *Commissioner*, 92 F. (2d) 593, 595 (bottom of first column) where the very situation there discussed and stated to be outside the scope of the *Gregory* case was later held to be within the doctrine of the *Gregory* case in *Helvering* v. *Elkhorn Coal Co.*, *supra*.

But even if the *Chisholm* case be accepted as good law, it is nevertheless distinguishable here. It was not shown in the present case that G. W. G. was ever employed for any purpose beyond the avoidance of the tax with respect to the profit on the Lay settlement. While it is true that it made several isolated purchases and sales of securities thereafter (R. 59), there is no showing or finding that the transactions constituted anything more than the investment and reinvestment of the money received from Lay, and that they were merely incidental to the safekeeping of those funds on behalf of the petitioner.

2. The taxpayer argues (Br. 18-23) that the facts found by the Board are conclusive if supported by substantial evidence. We do not disagree. But we do contend that whether the taxpayer is to be treated under the statute as having made the sale directly to Lay is a question of law or at least a mixed question of law and fact, to be determined upon the basis of the evidentiary facts. The Board itself regards this as a question of law, for in *Loewenberg* v. *Commissioner*, 39 B. T. A. 844, where it rejected the result it had reached in the instant case, it treated the issue as one of law, and in particular of the applicability of the principle of the *Gregory* case.

Indeed the *Gregory* case itself plainly shows that the issue is one of law. In that case the Board had decided against the Government. *Gregory* v. *Commissioner*, 27 B. T. A. 223. Upon appeal, the Circuit Court of Appeals reversed. *Helvering* v. *Gregory*, 69 F. (2d) 809 (C. C. A. 2d). Had the issue been merely one of fact, the Circuit Court of Appeals would not have had any power to reverse, if the findings were supported by substantial evidence. However, neither the Circuit Court of Appeals nor this Court treated the case as turning upon the sufficiency of the evidence to support the findings. We submit that the question here is like that presented in the *Gregory* case and that the scope of review is the same.

Similarly the question in *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, was regarded as one of law rather than of fact. The Board of Tax Appeals had there, too, ruled against the Commissioner. *Minnesota Tea Co.* v. *Commissioner*, 34 B. T. A. 145. The Circuit Court of Appeals reversed, *Helvering* v. *Minnesota Tea Co.*, 89 F. (2d) 711 (C. C. A. 8th), and this Court approved, treating the case as one involving the applicability of the doctrine of the *Gregory* case. Compare *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 491; *Helvering* v. *Rankin*, 295 U. S. 123, 131; *Bogardus* v. *Commissioner*, 302 U. S. 34, 39.

3. The following is submitted as an additional ground for affirming the judgment below, a ground that does not require disregarding the corporate fiction, nor does it require treating the transaction as a sale by the taxpayer directly to Lay.

Taking the transaction on its face, it can be said that the taxpayer realized the full amount of profit in 1933, and that the installment sales provisions were not intended to relieve him of the obligation to report it as income for that year.

First. The payment of $14,566.08 by G. W. G. to E. H. Harrison in fulfillment of petitioner's debt to Harrison plainly represents income to petitioner, for it has already been firmly established that the discharge of an obligation constitutes income to the debtor. *Old Colony Tr. Co.* v. *Commissioner*, 279

U. S. 716; *United States* v. *Boston & M. R. Co.*, 279 U. S. 732; *Douglas* v. *Willcuts*, 296 U. S. 1, 9; *United States* v. *Hendler*, 303 U. S. 564, 566. Cf. *United States* v. *Kirby Lumber Co.*, 284 U. S. 1; *Helvering* v. *Amer. Chicle Co.*, 291 U. S. 426. Accordingly, that amount should have been reported by petitioner as income.

Second. He received a contractual promise by G. W. G. to pay him $85,000, with interest, and since that promise was backed by $85,000 in cash (immediately after the sale to Lay), which he was in a position to protect, he then received corporate paper that was obviously worth its face value. Except for the installment-sales provisions, that corporate paper embodied income that should have been reported in 1933.

It is therefore merely necessary to say that the installment-sales provisions were not intended to apply here, which we have already undertaken to establish in part 1, *supra*. For, if it be established that the installment-sales provisions are inapplicable, then even though full recognition be given to the existence and operations of G. W. G., there is taxable gain (the discharge of the obligation to Harrison plus the corporate paper) which petitioner must account for in 1933 but which he has not reported.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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NOVEMBER 1939.

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SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1939.

George W. Griffiths, Petitioner,
vs.
Guy T. Helvering, Commissioner of Internal Revenue.

On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

[December 18, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here to review a decision of the Circuit Court of Appeals for the Seventh Circuit (103 F. (2d) 110) reversing an order of the Board of Tax Appeals (37 B. T. A. 314) which had overruled a deficiency assessment by the Commissioner of Internal Revenue in petitioner's income tax return for 1933. We granted *certiorari*, 308 U. S. —, because of an alleged conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit in *Smith* v. *Higgins*, 102 F. (2d) 456 (No. 146 this term).

The facts are undisputed, and, for purposes of our decision, may be thus abridged: In 1926 Griffiths, the petitioner, paid one Lay $100,000 for some stock. The investment was unprofitable, and the upshot of a complicated series of transactions was allowance to Griffiths by the Commissioner of a deductible loss of $92,500 for the year 1931 resulting from a sale of the stock by Griffiths to a family corporation. Thereafter, in 1932, Griffiths got wind of the fact that Lay had defrauded him in the 1926 sale. Negotiations were begun for a settlement of Griffiths' claim against Lay, and by January 1933, Griffiths' lawyer had devised an arrangement for such a settlement. The gist of the arrangement was this: Griffiths was to re-acquire the shares, convey them to a corporation newly created for the purpose of furthering the scheme and wholly controlled by Griffiths, which in turn was to transfer the stock back to Lay for $100,000 to be paid by him; and that sum was to be paid over by the corporation to Griffiths in annual installments for forty

years, with interest on the deferred payments.[1] The essentials of this scheme were carried out. Its purpose—to disguise by intervening elaborations what in fact was a rescission of the original purchase by Griffiths for $100,000—was made more manifest by these facts: Griffiths personally re-acquired and transferred the shares to Lay without revealing the existence of the new corporation, gave Lay a personal release of all claims against him, and personally received from Lay the $100,000 which he then turned over to the corporation.

On these findings the Commissioner ruled that Griffiths, having been allowed a deduction for loss attributable to the stock purchased from Lay and having now recouped that loss through settlement of his claim against Lay, was subject to tax for the amount of the settlement in 1933. We think the Commissioner was right, and that the Circuit Court of Appeals properly reversed the Board of Tax Appeals.

The facts leave little scope for legal explication. Griffiths had a claim for fraud against Lay which, when satisfied, wiped out the loss for which he had received an earlier deduction. Had satisfaction of the claim come to him without any conduit, it would have indisputably been his income. The claim having been recognized by Lay and cast into a form realizable by Griffiths, a lawyer's ingenuity devised a technically elegant arrangement whereby an intricate outward appearance was given to the simple sale from Griffiths to Lay and the passage of money from Lay to Griffiths. That was the crux of the business to Griffiths, and that is the crux of the business to us.

We cannot too often reiterate that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers*, 281 U. S. 376, 378. And it makes no difference that such "command" may be exercised through specific retention of legal title or the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the

[1] Of the total sum paid, $15,000 was to be applied by the corporation in payment of a personal indebtedness owed by Griffiths. This sum, of course, was clearly income to petitioner. The remainder was to be paid in installments by the corporation to Griffiths. Petitioner contends that these installments alone are taxable to him as they are paid, under the provisions of § 44 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

interposition of a subservient agency. Cf. *Gregory* v. *Helvering*, 293 U. S. 465. "A given result at the end of a straight path," this Court said in *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613, "is not made a different result because reached by following a devious path." Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed, particularly in the provisions of a tax law like those governing installment sales in § 44 of the Revenue Act of 1932. Taxes cannot be escaped "by anticipatory arrangements and contracts however skilfully devised . . . by which the fruits are attributed to a different tree from that on which they grew." *Lucas* v. *Earl*, 281 U. S. 111, 115. What Lay gave, Griffiths in reality got, and on that he must be taxed. The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.